APPELLATE CIVIL

Before P. S. Pattar, J.

SIRI CHAND—*Appellant.*

versus

RAM CHAND—*Respondent.*

S. A. O. No. 42 of 1973

March 5, 1974.

Code of Civil Procedure (Act V of 1908)—Section 99 and Order 18, Rules 5, 8 and 14—Evidence of the witnesses in appealable case not recorded in the court-language, but by dictation to a typist in English—Judge signing the evidence—Such recording of the evidence—Whether constitutes an illegality rendering the depositions inadmissible—Decree passed on the basis of such evidence—Whether void.

Held, that in cases which are appealable, there may be either one or two records of the evidence. If there is only one record, it should be made in writing by the Judge in his own hand; if, however, the evidence is taken down in writing by some person other than the Judge, though in the presence and personal direction and superintendence of the Judge, then the Judge should also make or cause to be made a memorandum as provided by rules 8 and 14 of Order 18, Civil Procedure Code. If the evidence of the witnesses is not recorded in the language of the Court by the Judge himself, but is dictated to a typist in English and the evidence is signed by the Judge, then the provisions of Order 18, Rules 5, 8 and 14 of the Code are not complied with. These provisions are, however, directory and non-compliance with them does not render the depositions inadmissible. The recording of the evidence in such a manner is not an illegality, but only an irregularity not affecting the merits of the case or the jurisdiction of the Court. It does not render the decree passed on its basis as null and void.

Second Appeal from the order of the Court of Shri R. L. Garg, Additional District Judge, Gurgaon, dated the 13th August, 1973, reversing that of Shri Hari Ram, Sub-Judge, 1st Class, Gurgaon, dated the 16th April, 1971 and accepting the appeal and setting aside the judgment and decree of the trial Court and remanded the suit to it for fresh decision after recording evidence of the parties in accordance with law and leaving the parties to bear their own costs.

G. C. Mittal, Advocate, *for the appellant.*

Balwant Singh Gupta, Advocate, *for the respondent.*

JUDGMENT.

PATTAR, J.—This is an appeal filed by Siri Chand defendant against the order dated 13th August, 1973 of the Additional District Judge, Gurgaon, whereby he accepted the appeal of Ram Chander plaintiff and set aside the judgment and decree of the trial Court and remanded the suit to it for fresh decision after recording evidence of the parties in accordance with law.

(2) The facts of this case are that Bhura Lal, adopted son of Mst. Gainda widow of Nathi Mal was the owner of the land in suit fully described in para No. 1 of the plaint and he died on December 10, 1967. On October 20, 1967, he executed a will bequeathing all his property in favour of Ram Chander plaintiff. After the death of Bhura Lal, the land was mutated by the revenue authorities in favour of Siri Chand, defendant, who claimed himself to be the adopted son of Bhura Lal. The plaintiff, therefore, filed suit for possession of this land on the allegations that he is entitled to inherit this land on the basis of will executed by Bhura Lal in his favour and that the deceased did not adopt Siri Chand as his son. The factum and the validity of the alleged adoption was challenged. The defendant denied the allegations made in the plaint. On the pleadings of the parties, the following issues were framed by the trial Court :—

"(1) Whether the deceased made a valid will in favour of the plaintiff? If so, to what effect?

(2) Whether the plaintiff is a direct descendant of the common ancestor of Bhura Lal deceased, if so, to what effect ?

(3) Whether the defendant was adopted by Bhura Lal, if so, to what effect ?

(4) Whether the suit is within limitation ?

(5) Whether the parties are governed by Custom in matters of succession and adoption and alienation, if so, what that custom is ?

(6) Whether the suit property is ancestral property of the deceased *qua* the defendant ?

(7) Whether the suit property is ancestral and co-parcenary *qua* the deceased and the defendant ?

(8) Whether the suit is properly valued for purposes of Court-fee ?

(9) Rlief."

The trial Court decided issues Nos. 4, 5 and 8 in favour of the plaintiff and decided issues Nos. 1, 2, 3, 6 and 7 against the plaintiff. As a result, the suit of the plaintiff was dismissed. Feeling dissatisfied, Ram Chander plaintiff filed appeal against this decree in the Court of the District Judge. On behalf of the appellant, it was contended before the Additional District Judge, who heard the appeal, that the trial Court did not record the evidence in Hindi, which was the Court language in the State of Haryana and that there was no legal evidence on the file and the decision of the trial Court, therefore, cannot be sustained. This contention prevailed with the Additional District Judge, who accepted the appeal, set aside the Judgment and decree of the trial Court and remanded the case to it for fresh decision after recording evidence in accordance with the law. Feeling dissatisfied, Siri Chand defendant filed this appeal alleging that the decision of the lower appellate Court is wrong and incorrect and it may be set aside and the case may be remanded to the lower appellate Court for deciding the appeal of Ram Chander plaintiff on merits.

(3) It is undisputed that the trial Court did not record the evidence of the witnesses of the parties in Hindi, which is the Court language in the State of Haryana and their evidence was recorded in English only. According to the lower appellate Court, the provisions of Order 18, Rules 5, 8 and 9 of the Code of Civil Procedure were contravened by the trial Court. I may set out these provisions for facility of reference:—

"*Order* 18, *Rule* 5.—In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintedence of the Judge, not ordinarily in the form of question and answer, but in that of a narative, and, when completed, shall be read over in the presence of the Judge and of the witnesses, and the Judge shall, if necessary, correct the same, and shall sign it.

Order 18, *Rule* 8.—Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and

such memorandum shall be written and signed by the Judge and shall form part of the record.

Order 18, *Rule* 9.—Where English is not the language of the Court, but all the parties to the suit, who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down".

Rule 9 of Order 18, Civil Procedure Code has no application to the present case because it is undisputed that none of the witnesses of the parties gave evidence in English. Rule 8 of Order 18, Civil Procedure Code, envisages that if the evidence is taken down in writing by some person other than the Judge though in the presence and under the personal direction and superintendence of of the Judge, then the Judge also should make or cause to be made, a memorandum as provided by this rule. In case, the Judge is unable to make a memorandum as required by rule 8, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court, as required by rule 14 of Order 18. A perusal of the record of this case shows that the Subordinate Judge dictated the evidence of all the 12 witnesses of the plaintiff to a typist in English. The Subordinate Judge himself recorded in Hindi the statements of Jaffar Hussain D. W. 1 and Ishwari Parshad, petition-writer, D.W. 2. The Subordinate Judge himself recorded in English the statements of Jai Narain D.W. 3, Om Parkash D. W. 4, Sher Lal D. W. 5, Sangram Singh D. W. 6 and Kanshi Nath, D.W. 7 and also the statements of Sat Pal D.W. 10, Kishan Murari Lal D.W. 11, Ram Kishan Gupta D.W. 12, Ram Nath D.W. 13, Chandgi Ram D.W. 14, Bal Ram D.W. 15 and Mool Chand D.W. 18. However, the statements of Mool Chand D.W. 8, Nathi Mal D.W. 9, Murari Lal D.W. 16 and Debi Sahai D.W. 17 were dictated in English by the Subordinate Judge to a typist. The statement of Siri Chand defendant as D.W. 19 was partly written in English by the Subordinate Judge and partly it was dictated in English to the typist. Therefore, it is clear that the evidence of the parties was not recorded by the trial Court in accordance with the provisions of Order 18, Rules, 5, 8 and 14. The evidence of all the witnesses of the parties excepting the statements of Jaffar Hussain D.W. 1 and Ishwari Parshad D.W. 2 was not recorded in Hindi, which is the official language of the Courts in Haryana. However, Order 18, Rule 6, Civil Procedure Code, lays down that when the evidence is taken down in a language different

from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given. There is no documentary evidence on the file to show that the evidence of all the witnesses recorded in English was interpreted to them as required by this rule 6. However, at the end of the statements of each of these witnesses, the words 'R.O. & A. C.' i.e., read over and admitted correct are written. According to illustration (e) of section 114 of the Indian Evidence Act, the Court may presume that all judicial and official acts have been regularly performed. There is no allegation on the file to show that the statements of the witnesses, whose evidence was recorded in English, were not interpreted to them. So, it can be presumed that the statements were interpreted to the witnesses after these were recorded.

(4) Mr. G. C. Mittal, the learned counsel for the appellant relied upon several decisions of the various High Courts and the Supreme Court to show that the non-recording of the evidence in the manner required by Order 18, Rules 5, 8 and 14, Civil Procedure Code is not an illegality, but is a mere irregularity, which did not affect the merits of the case or the jurisdiction of the court and consequently the decree of the trial court could not be reversed.

(5) The first case replied upon by him is *Promode Nath Sinha Roy and others* v. *Harishee Bagdhi* (1). The facts of this case were that the evidence of the witnesses was not taken down in writing by the Judge himself and the Judge did not make a memorandum or caused the memorandum to be made. The evidence of the witnesses was dictated by the Judge to a typist and a copy of the typed record was revised and signed by the Judge, who added at the end of each deposition the words, 'dictated by me to avoid eye strain', 'Shashi Jiban Sen-Munsif'. There was only one record of the evidence and that was not taken down by the Judge himself nor any memorandum was made or caused to be made by the Judge and the provisions of Order 18, Rules 5, 8 and 14 were not complied with. On these facts, it was held per head notes (a) and (b) as follows:—

"In cases where an appeal is allowed, there might be either one or two records of the evidence. If there is only one

(1) A.I.R. 1929 Cal. 78.

record, it should be made in writing by the Judge's own hand; while, if the evidence is taken down in writing by some person other than the Judge, though, 'in the presence and under the personal direction and superintendence of the Judge,' the Judge also should make or cause to be made a memorandum as provided by Rules 8 and 14.

Where evidence of witnesses was dictated to a typist and the typed copy was revised and signed by the Judge, who added at the end of each deposition 'dictated by me', the provisions of Order 18, Rules 5, 8 and 14 were not complied with, but recording the evidence thus is not an illegality but amounts merely to an irregularity."

The next case relied upon by him is *Kiran Singh and others* v. *Chaman Paswan and others* (2) wherein it was held per headnotes (a) and (b) as under:—

"It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

The principle that underlies section 11 (Suits Valuation Act, 1887) is that a decree passed by a Court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under-valuation, is not to be treated as, what it would be but for the section, null and void, and that an objection to jurisdiction based on over-valuation or under-valuation, should be dealt with under that section and not otherwise.

The same principle has been adopted i nsection 21, Civil Procedure Code, with reference to the objections relating

(2) A.I.R. 1954 S.C. 340.

to territorial jurisdiction. The policy undelying section 21 and section 99, Civil Procedure Code and section 11 of the Suits Valuation Act, is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court unless there has been a prejudice on the merits."

(6) Section 80, Civil Procedure Code, lays down that no suit shall be instituted against the Government or against a public servant in respect of any act purporting to have been done by such officer in his official capacity until the expiration of two months next after notice in writing has been delivered to or served on the Government or the Government official.

(7) In *Vellayan Chettiar and others* v. *The Government of the Province of Madras and another* (3), it was observed that the notice required to be given under section 80, Civil Procedure Code is for the protection of the authority concerned and if in a particular case he does not require that protection and says so, he can lawfully waive his right to the notice.

(8) In *State of Rajasthan* v. *Girdharilal Chamanlal Modi* (4), the facts were that in a suit against the Rajasthan Government for damages for breach of contract which was entered into with the former Government of Jaipur State, the defendant Rajasthan State did not raise the plea that the notice given to then Jaipur State was not sufficient compliance with section 80, Civil Procedure Code, and no issue was framed on that question, but it was sought to be raised for the first time in appeal. The Full Bench of the Rajasthan High Court held that it was not open to the Rajasthan State to raise that plea for the first time in appeal as it must be deemed to have been waived.

(9) *In Dhian Singh Sobha Singh* v. *Union of India* (5), it was observed at page 282 that the objection regarding the

(3) A.I.R. 1947 P.C. 197.
(4) A.I.R. 1959 Raj. 126 (F.B.).
(5) A.I.R. 1958 S.C. 274.

validity of Section 80, Civil Procedure Code, was not taken by the defendants in the written statement nor was any issue framed in that behalf by the trial Court and, therefore, this may justify the inference that the objection under section 80, Civil Procedure Code, has been waived.

(10) In the instant case, the statements of the witnesses of the plaintiff were dictated in English to the typist by the trial Court and similar procedure was followed when the statements of the witnesses of the defendant-appellant were recorded, but no objection was taken by the plaintiff to this procedure followed by the trial Court. When the appeal was filed against the decree of the trial Court in the Court of the District Judge, the plaintiff did not take any objection that the evidence of the parties was not recorded in accordance with the provisions of order 18, Rules 5, 8 and 14, Civil Procedure Code and this objection was taken for the first time during arguments by his counsel. Therefore, the plaintiff must be deemed to have waived this objection and he should not have been allowed to raise this objection for the first time during arguments. The provisions of Order 18, Rule 5, Civil Procedure Code, are directory and non-compliance with them does not render the deposition inadmissible, *vide Mirabux* v. *Emperor* (6). Section 99, Civil Procedure Code, lays down that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or cause of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. In the instant case, the non-compliance of the povisions of Order 18, Rules 5, 8 and 14 of the trial Court is not an illegality but an irregularity not affecting the merits of the case or the jurisdiction of the Court and, therefore, the Additional District Judge had no power to accept the appeal and set aside the decree of the trial Court and remand the case for fresh decision after recording the evidence according to law.

(11) The learned counsel for the respondent-plaintiff contended that the evidence of the witnesses was not recorded by the trial Court in accordance with the provisions of Order 18, Rules 5, 8 and 14, and, therefore, there was no legal evidence on the file, which could be acted upon and the decision of the lower appellate Court was correct. In support of this contention he relied on *The*

(6) A.I.R. 1923 Nagpur 39.

Empress v. *Mayadeb Gossami* (7). The facts of this case were that a prisoner applied for a certificate under Act XL of 1858 in respect of the estate of two infants, and in support of his application he gave a sworn deposition before the District Judge. His deposition was made in Assamese and was translated by the Sherishtadar of the Court and the Judge recorded it in English. He did not sign it, nor was it read over to the witness or translated. The requirements of sections 182 and 183 of the Code of Civil Procedure 1877 were not complied with. On these facts, it was held that the infirmities which took place in recording the deposition of the witness rendered the records of his evidence inadmissible for failure to comply with the provisions of Sections 182 and 183, Civil Procedure Code. This case is clearly distinguishable and has no application to the facts of this case. In that case, the deposition was neither signed by the witness nor it was read over to him or translated to him. Consequently, the evidence was not legally recorded.

(12) The next case relied upon by the counsel for the respondent is *Ningthoujam Ibobi Singh and another* v. *Laisram Boramani Singh* (8). It was a case of recording of evidence in a small cause suit, in which an appeal was not allowed. The records showed that there was only the pleas and the judgment and there was no substance of the evidence of the witnesses produced before the Court. According to Order 18, Rule 13, Civil Procedure Code, the Judge was required to prepare a memorandum of the substance of what every witness deposed, but this was not done at all and, therefore, for non-compliance with this mandatory provision, the decision of the lower Court was set aside and the case was remanded to it to proceed according to law.

(13) The next case relied upon by him is *Nand Lal and another* v. *Pooran and another* (9). In that case, the evidence in a case in which no appeal was allowed was recorded by the Clerk attached to the Court, while the Judge was busy in doing the other work. The decision was, therefore, set aside because the evidence was not recorded by the presiding officer in the manner prescribed by law. The judgment based on evidence written by a Clerk, therefore, was held to be illegal.

(14) The last case, on which reliance was placed by the counsel for the respondent, is *Ethiraj* v. *K. Gopalaswamy Chetty* (10). In

(7) I.L.R. (1881) VI Cal. 762.
(8) A.I.R. 1965 Manipur 34.
(9) A.I.R. 1956 Raj. 9.
(10) (1972) I M.L.J. 402.

that case, the High Court had remanded a case to the trial Court directing that the evidence must be recorded completely instead of taking merely a memorandum of the evidence. However, the trial Court again failed to do so and sent up something in the nature of a memorandum of evidence and the evidence was not read over in the presence of the Judge nor signed by the Judge. It was, therefore, held that the decree and judgment of the lower Court could not be sustained and the same were set aside and the case was remanded to the trial Court for recording evidence properly as required by Order 18, Rule 5, Civil Procedure Code.

(15) It is thus clear that all these four cases relied upon by the counsel for the respondent are distinguishable and have got no application to the present case. The law is well settled that in cases where an appeal is allowed, there may be either one or two records of the evidence and if there is only one record, it should be made in writing by the Judge's own hand; while if the evidence is taken down in writing by some person other than the Judge, though in the presence of and under the personal direction and superintendence of the Judge, then the Judge should also make or cause to be made a memorandum, as provided by rules 8 and 14 of Order 18, Civil Procedure Code. However, if the evidence of the witnesses is not recorded in the language of the Court by the Judge himself, but is dictated to a typist in English and the evidence is signed by the Judge, then the provisions of Order 18, Rules 5, 8 and 14, Civil Procedure Code, are not complied with and the recording of the evidence in this manner is not an illegality, but an irregularity which would not render the decree passed on its basis as null and void, and the decree cannot be reversed in view of the provisions of Section 99, Civil Procedure Code. However, it is proper and desirable to record the evidence in the language of the Court.

(16) For the above reasons, I hold that the decision of the learned Additional District Judge cannot be sustained. This appeal is, therefore, accepted and the order of the Additional District Judge dated 13th August, 1973 setting aside the judgment and decree of the trial Court and remanding the case to the trial Court for fresh decision after recording evidence in accordance with law is set aside and the case is sent back to the Additional District Judge for deciding the appeal filed by Ram Chander plaintiff on merits. Under the circumstances of the case, the parties are left to bear their own costs.

B.S.G.