
(2002) 09 CAL CK 0026
In the Calcutta High Court
Case No : G.A. No. 1350 of 2002

Dever Park Builders Pvt. Ltd. and Others	APPELLANT
Vs	
Smt. Madhuri Jalan and Others	RESPONDENT

Date of Decision : 09-09-2002

Acts Referred:

Evidence Act, 1872 — Section 138, 33

Citation : AIR 2003 Cal 55 : AIR 2002 Cal 281 : (2003) 1 CivCC 598 : (2002) 2 ILR (Cal) 328

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Judgement

Kalyan Jyoti Sengupta, J.—In this extraordinary suit the short but complex point has been raised by the parties as to whether the evidence recorded by the original defendant No. 1 Mahabir Prasad Jalan, since deceased on commission should be expunged and/or rejected at this stage, as, cross-examination could not be completed in view of his death during examination.

2. By my order dated July 18, 2001, though having heard the learned Lawyer for the plaintiff I expunged the evidence of the aforesaid defendant, however, subsequently I granted stay of operation of the aforesaid order and I decided to resolve the issue raised above.

3. Mr. Bimal Kumar Chatterjee, Senior Advocate appearing with Mr. Ajoy Krishna Chatterjee Senior Advocate contends that it is true the original defendant did not get opportunity to face cross-examination fully in view of his death. However, evidence so far given by him in his full examination in chief and in part cross-examination together with document exhibited in the commission should be admitted, but the weight of such evidence should be attached such degree and standard as this Court will think fit and proper. Therefore, his evidence cannot be rejected or expunged altogether, as he was not cross-examined fully for no fault of his own. He was seriously ill during the relevant time, From time to time attempt was made to cross-examine him and he was prepared to face it. This

could not happen. So far this reason entire evidence should not be brushed aside. They seek support for their contention of the provision of Order XXVI, Rules 1, 2, 3, 7, 8, 9 and 10 of the Code of Civil Procedure, Order XXIX, Rules 7, 8, 9 and 10 of CPC, Rules 1, 2, 3, 4 and 5 of Chapter XXII of the High Court Rules, Original Side, Section 33 of the Evidence Act and Sarkar on Evidence (15th Edn.) Vol. 1, Pg. 750. They have placed several decisions of various High Courts and Supreme Court that have decided the aforesaid question both in Civil and Criminal Cases.

4. Following are the decisions in support of their point which are rendered in civil cases;

- (i) Maharaja of Kolhapur Vs. S. Sundaram Ayyar and Others, ;
- (ii) Balwant Singh Vs. Ram Charan Singh, ;
- (iii) AIR 1935 Pat 34 (Mr. Horli Kumar v. Rajab Ali);
- (iv) (1912) 16 CWN 991 (W. Stewart v. The New Zealand Ins. Co. Ltd.);
- (v) (1901) 5 CWN 230 (Boisagomoff v. The Nahapiet Jute Co. Ltd.);
- (vi) (1910) 11 CLJ 124 (Chatoo Kumari v. Rajaram Tiwari);

5. Following are the decisions decided in Criminal cases on the aforesaid point;

- (i) AIR 1929 Lahore 840 (2) (Mangal Sen v. Emperor);
- (ii) AIR 1933 Lahore 561 (Diwan Singh v. The Emperor);
- (iii) In Re: Bora Narasimhulu, ;
- (iv) Chintamani Das and Others Vs. The State, ;
- (v) AIR 1946 Pat 384 (Srikisun Jhunjhunwala v. Emperor);
- (vi) Mulkh Raj Sikka Vs. Delhi Administration, ;
- (vii) 2001 (Suppl 1) JT (SC) 545. Satnam Singh v. Sadhu Singh.

6. Mr. Rajat Ghosh at one point of time appeared and thereafter Mr. Pijush Kanti Dutt, Senior Advocate argued on behalf of the plaintiff and contended that the evidence of the deceased defendant cannot be admitted , before as any cross-examination in real sense could be done he had passed away. His contention is that unless evidence of a particular witness is tested and screened by cross-examination, it is no evidence. He has drawn my attention to a summary prepared by him of the evidence given by the deceased defendant in examination-in-chief and in cross-examination and urges that in real sense there was no cross-examination. So his contention is that u/s 33 of the Evidence Act his evidence has to be expunged and the order passed by me should not be recalled and that was accurate order in these circumstances.

7. In support of his contention he has relied on the following decisions :

- (i) Narsingh Das Vs. Gokul Prasad and Others, ;
- (ii) AIR 1930 79 (Privy Council) ;
- (iii) S.C. Mitter Vs. The State, ;
- (iv) Phani Bhusan Ghosh and Another Vs. Sibakali Basu, .

8. Having heard the respective contention of the learned Counsels it seems to me that the provision of Section 33 of the Evidence Act which is sought to be relied on by both the learned Counsels is not applicable in this case. I am unable to find any reason as to why the provision of Original Side Rules or the CPC regarding the issue and functioning of the commission will be helpful to the defendant. In this case the issue is precisely the evidence already recorded by the learned Commissioner of the deceased defendant, who did not face cross-examination fully, is to be admitted and further to be considered at the time of the trial of and deciding the suit or not. Section 33 of the Evidence Act in my view will not be applicable in this case in a proceeding of this nature. "Therefore, I set out Section 33 of the Evidence Act :

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. -- Evidence given by a witness in a judicial proceeding, or before any person authorised 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;

Provided --

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examination;

that the questions in issue were substantially the same in the first as in the second proceeding."

9. In this case the evidence of the deceased defendant was not given in a proceeding other than the present one on earlier occasion so question of using the same does not arise. The evidence given by the deceased defendant in the same very suit itself is sought to be used. So the conditions in the proviso of Section 33 are not at all applicable. The Second condition as mentioned in the proviso would be applicable in proceeding (civil or criminal) having two stages and having scope for examining witnesses. For example in sessions trial under old criminal procedure code at the time of committal before the committing Court the witness in support of prosecution had to be examined and the accused had

opportunity to cross-examine at that stage at his option, or could do at the time of trial.

10. In this case there is one and singular stage in the proceedings. Therefore. Section 33 of the Evidence Act will not at all be helpful nor it is applicable here. The issue is whether the testimony of the deceased defendant with unfinished cross-examination will be admissible or be considered at the time of hearing or rendering judgment in this case or not. Under the provisions of Section 138 of the Evidence Act order of examination of witness is provided. It appears therefrom the witness shall be first examined-in-chief by the party who has called him and then if the adverse party so desires may cross-examine and thereafter if the party calling so desires may re-examine. Upon careful reading of the said Section it would be apparent that the cross-examination is not a must nor as a matter course, or without the same the evidence given in examination-in-chief cannot be rejected nor expunged. However, if the adverse party opts, for, certainly, the cross-examination is a must. There is substance in submission of Mr. Bimal Chatterjee that there is no provision under law if the witness is not cross- examined either in full or part his evidence would be absolutely rendered inadmissible. In absence of this provision, problem of this nature can be addressed by the help the judicial pronouncements that will certainly be guiding factor.

11. I find Madras High Court in case of Maharaja of Kolhapur Vs. S. Sundaram Ayyar and Others, held amongst other where witness was examined in chief, however, there was hardly any cross-examination and before it could be concluded the witness died, still the unfinished testimony of the deceased witness was not rejected or held to be inadmissible. It was held amongst others there in at page 538 Column 1 that the evidence is admissible but the weight to be attached to such evidence should depend upon the circumstances of each case and that, though in some cases the Court may act upon it, if there is either evidence on record, its probative value may be very small and may even be disregarded. In that case though the learned Judges did not attach any weight to the evidence of the deceased witness who was not cross examined in full. However, the principle is very clear for guidance.

12. In a judgment of the Allahabad High Court in case of Balwant Singh Vs. Ram Charan Singh, , it was held amongst other that there is certainly no provision in the Evidence Act that evidence of a witness who has been examined by the Court upon oath shall be excluded because it has not been possible for the other party to cross-examine him. Difference between getting evidence on the ground it is legally, inadmissible and ignoring it upon the ground that it should not be believed may often be of very little importance. But the distinction is important in principle because if the evidence is inadmissible the Court is not entitled to consider it at all, whereas if it is admissible the Court must decide on the circumstances of each cast whether any weight should be attached to it or not.

13. I hold that the provision of Indian Evidence Act would support the proposition

that evidence of Wazir in these circumstances is admissible, but the Judge who is dealing with it must decide whether he believes the facts stated or does not believe them.

14. In a decision of the Patna High Court in case of Mr. Horli Kumar v. Rajab Ali reported in AIR 1936 Pat 34 it was held amongst other that the weight to be attached to the evidence of the witness who died before he could be cross-examined in commission, would depend upon the circumstances and the Court should look at the evidence carefully to see whether there are indications on cross-examination the testimony of the witness was likely to be settled.

15. In a decision of the Calcutta High Court Chamaru Sahu and Others Vs. Sona Koer it was held that the evidence of a witness in examination-in-chief was accepted in view of the fact that the plaintiff allowed the witness to go uncross-examined in the hope of getting his evidence rejected as in examination-in-chief the testimony of that particular witness was against the plaintiff.

16. The following judgments that were rendered in the criminal cases and wherein the evidence of a witness whose cross-examination remained unfinished was admitted by the learned Judges.

17. In the case of Mangal Sen v. Emperor reported in AIR 1929 Lah 840, the Lahore High Court held that such case is admissible but the weight to be attached to it depend upon the circumstances of each case.

18. In another decision of the Lahore High Court (Diwan Singh v. The Emperor) reported in AIR 1933 Lah 561 it was held amongst other that the evidence of the witness who left before his cross examination could be completed was made admissible. There are other number of decisions wherein the evidences of the witnesses in criminal trial under the old Criminal Procedure Code were not accepted as at the committal stage they could not be cross-examined or they could not be found. The decisions cited by Mr. Dutt in the cases of the Criminal Sessions Trial under the provisions of the old Code whereunder there were scope for examining and cross-examining the witness in two different stages and the provisions of Section 33 of the Evidence Act was applicable. Those cases are not really helpful in this case.

19. Therefore, from the aforesaid catena of decisions which are rendered in Civil cases and from the discussion reached by me hereinabove I hold that the testimony of the deceased defendant is admissible and the Court is bound to consider its weight to be attached for deciding this matter. Each and every proof in examination in chief does not require being cross-examined. There are cases where no cross-examination is really required. I find here a portion of the examination-in-chief has been cross-examined and such portion in my view should be absolutely admissible in evidence and be considered without any hesitation by the learned Judge at the time of hearing and deciding of the suit. Cross-examination is essentially needed to bring out the truth of the oral testimony, but in case of documentary evidence where there is no suggestion or

pleading as to fraud and forgery the cross-examination hardly matters.

20. Therefore, I am unable to accept the argument of Mr. Dutt that the evidence of the deceased defendant shall be expunged and/or rejected altogether. It shall be considered and how much weight shall be attached should be decided considering the other facts and circumstances surrounding it. So the earlier order passed by me expunging the evidence of deceased defendant is recalled and the document and evidence already received in commission shall now be admitted as records of this case. Parties would be at liberty to use any of the exhibited documents.

21. Mr. Khaltan appearing for the plaintiff prayed for stay of operation of this judgment and order. Such prayer is opposed.

22. Having regard to the facts and circumstances of this case I am of the view that no stay should be granted.

23. Let the suit appear in the list as "Part Heard Suit" on 20th Sept. 2002.

24. Xerox certified copy of this judgment, if applied for, be given to all the parties on urgent basis.