

(2010) 03 KAR CK 0118

In the Karnataka High Court

Case No : Writ Petition No"s. 36459-62 of 2009

K.N. Vishwanathan Nair and Mrs. V.G. Vasanthi

APPELLANT

Vs

Smt. K. Rajani

RESPONDENT

Date of Decision : 29-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10A, 151

Citation : (2010) 03 KAR CK 0118

Hon'ble Judges : Ravi Malimath, J

Bench : Single Bench

Advocate : H.V. Ramachandra Rao, for the Appellant; Jose Sebastian, for the Respondent

Judgement

Ravi Malimath, J.—In the suit by the respondent seeking release of Rs. 7,05,077,65p/- with interest at 18% and consequential reliefs I.A.14 was filed by the petitioners-defendants under Order 26 Rule 10A r/w Section 151 of CPC seeking to issue a Commissioner for examination of the signature on Ex.P-1 with standard and specimen signature of the 1st defendant and fee opinion. The trial Court by the impugned order rejected the said application. Hence, Writ Petition No. 36459 and 36460/2009.

2. I.A. No. 15 was filed by the petitioner u/s 151 of CPC seeking to recall PW1 for further examination. The trial Court by the impugned order rejected the said application. Hence, Writ Petition Nos. 36461-62/2009

3. Regarding Writ Petition No. 36459 to 36460/2009 the learned Counsel appearing for the petitioner contends that the impugned order is bad in law and liable to be set aside. He contends that the trial Court has committed an error in rejecting the application in as much as the appointment of a Commissioner is necessary in view of the facts narrated by him. He contends that the rejection of his application would tell upon his legal rights in as much as the opinion of an expert would be necessary for the just and final adjudication of the suit. He, therefore, contends that a hand writing expert requires to be appointed for the

examination of Ex.P-1, namely, the Receipt.

4. Sri. Jose Sebastian, learned Counsel appearing for the respondent defends the impugned order and submits that no interference is called for. He contends that it is the second Commissioner that would be appointed and hence it is impressible in law. In support of his contentions he relies on the Judgments in the case of Stella v. Nathalla reported in 1974 Kar.L.J. (Short Notes) Item 296, in the case of K. Ramalingam Vs. M.V. Ramanathan, and in the case of Swami Premananda Bharathi Vs. Swami Yogananda Bharathi and Another, .

5. The contention of the learned Counsel appearing for the respondent is that a second Commissioner cannot be appointed until and unless the report of the first Commissioner is set aside. The submission of the learned Counsel appearing for the respondent is unsustainable. There is no appointment of a first Commissioner in this instant case. The report of the Commissioner relied upon by the respondent is an investigation that has taken place in the criminal proceedings between the same parties. Therefore to contend that the appointment of the present Commissioner would amount to appointment of a second Commissioner is wholly unsustainable and is opposed to facts. There is no appointment of Commissioner so far as the criminal proceedings are concerned and the report of the Commissioner has been prepared under due procedure under the criminal law. Hence it cannot be contended that the appointment of a Commissioner in these proceedings would amount to a second appointment.

6. The decision relied upon on in the case of K. Ramalingam Vs. M.V. Ramanathan, to the effect that when the order appointing the Commissioner has been passed without any reasons and the opposite party was not given an opportunity to challenge the application for issuing a second commission, the order was held to be invalid and was set aside. Undisputedly, that is not the position in the instant case. Substantial reasons have been recorded for the appointment of the Commissioner and a reply has also been given by the respondent-plaintiff in this regard. Hence, the Judgment is wholly inapplicable to the case on hand.

7. The second Judgment relied upon by is in the case of Stella v. Nathalla reported in 1974 Kar.L.J. 296 wherein it was held that where the parties prefer objections to the report of the Commissioner, the Court should direct the Commissioner to answer the objections and make a further report. That if the appellate Court had any difficulty in regard to the report of the Commissioner with reference to his plan, the appellate Court itself could take additional evidence requiring the Commissioner to make a further report. The appellate Court could not direct the appointment of a second Commissioner without setting aside the report of the first Commissioner. This Judgment has no nexus, to the case on hand. In the present case, no second Commissioner has been appointed, and the appointment of the Commissioner is on the first occasion by a Civil Court. Hence, in the said Judgment it is held that the appellate Court could not direct the second Commissioner, is wholly inapplicable to the case on hand.

8. The third Judgment relied upon is in the case of Swami Premananda Bharathi v. Swami Yogananda Bharathi and Anr. reported in AIR 1985 Kerala 83. It was held therein that in the case of setting aside of the appointment of the Commissioner's report, the reasons would have to be forthcoming and the setting aside the report on the sole ground that the second Commissioner's report was ordered and obtained is illegal and in excess of the jurisdiction. It was held that the appointment of second Commissioner before superseding the first Commissioner's report is illegal and jurisdictional error. As held earlier there is no second Commissioner that has been appointed by the Court. It is the first application that is being considered for appointment of a Commissioner and hence the said Judgment is wholly inapplicable to the case on hand.

9. The genesis of the respondent's contention is that the hand writing expert having submitted his report in the criminal investigation this application before the Civil Court cannot be made for appointment of a second Commissioner. The basis on which the argument has been made is wholly unsustainable. As held earlier the hand writing expert has submitted his report in pursuance to the Criminal law (sic) in motion. Notwithstanding the same, the Civil Court in these proceedings having appointed the Commissioner for the first occasion the entire submission of the respondent with regard to the maintainability of the second Commissioner's report is wholly unsustainable and liable to be rejected.

10. Regarding W.P.36461-62/2009 an application has been filed seeking to recall P.W.1 for further cross-examination. On the ground that the petitioner could not be present in the Court in view of his advanced age. Therefore, he being a senior citizen and due to his advanced age, his legal rights could not be faded away by non-recalling of the witness.

10. The trial Court while rejecting the application came to the conclusion that in an earlier proceeding the Advocate for the defendants was permitted to cross-examine P.W.1 on or before 15-9-2008. The same has not been done and hence the application was rejected. Therefore in view of the directions issued there is no necessity to give further liberty to cross-examine P.W.1.

11. I am unable to accept the reasoning accorded by the trial Court. Notwithstanding the directions issued by this Court as stated in the said order, the trial Court should have considered the affidavit on its merits before rejecting it. The affidavit filed in support of the application would refer to the advanced age of the petitioner and his failing health. As a result of which he could not personally contact his Advocate with regard to the deposition of P.W.3. The trial Court should have therefore appreciated the reasons stated in the affidavit and in the light of the legal rights of the defendants.

For the aforesaid reasons, the order dated 17-11-2009 passed by the learned City Civil Judge, CCH No. 20, Mayo Hall, in O.S. No. 16218/2003 on I.A. No. 14 I.A. No. 15 are set aside. I.A. No. 14 & I.A. No. 15 stand allowed.

Rule made absolute.