
(2004) 04 BOM CK 0069

In the Bombay High Court

Case No : Writ Petition No. 3655 of 2004

Kumudini Damodar Magar and Others

APPELLANT

Vs

Bhushan Damodar Magar and Others

RESPONDENT

Date of Decision : 29-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 16, Order 18 Rule 3A

Citation : AIR 2004 Bom 397 : (2004) 4 ALLMR 782 : (2004) 3 MhLj 214

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : S.M. Oak, instructed by Ambar Joshi, for the Appellant; Gauri Godse, for the Respondent

Final Decision : Allowed

Judgement

V.C. Daga, J.—Rule returnable forthwith.

By consent of parties petition is heard finally.

2. This petition is directed against the order passed by the Civil Judge, Senior Division, Alibag below Exh. 62 in Special Civil Suit No. 59 of 2000, whereby the trial Court in exercise of powers under Order 18, Rule 16 of Code of Civil Procedure, 1908 ("C.P.C" for short) allowed defendant No. 2 to lead evidence before the evidence of the plaintiffs is opened.

Outline Chronology:

3. The outline chronology giving rise to the present petition, in nutshell is that, the respondent Nos. 1 and 2/original plaintiffs filed a suit being Special Civil Suit No. 59 of 2000 in the Court of Civil Judge, Senior Division, Alibag for declaration that they are the children born to respondent No. 2/original defendant No. 2 and Shri Damodar Sitaram Magar, who, was original defendant No. 1 in the suit, left for heavenly abode during the pendency of the suit. The petitioners herein are the original defendant Nos. 3 to 6. Parties to the petition are hereinafter referred

to in their original capacity for the sake of clarity.

4. The contention of the plaintiffs in the suit is that defendant No. 2 was married to late Damodar according to the Hindu rights. They stayed together for about two years. However, in view of difference of opinions between both of them they obtained customary divorce which, in the submission of the plaintiffs, was not legal and valid in view of the provisions of the Hindu Marriage Act.

5. The plaintiffs' further contention is that in spite of subsistence of the first marriage of late Damodar with defendant No. 2 he again married with defendant No. 3 somewhere in the year 1970. However, in spite of second marriage, late Damodar continued to cohabit with defendant No. 2 and that has given birth to the plaintiffs. The plaintiffs, in this backdrop, prayed for decree of declaration that the plaintiffs are the children of late Shri Damodar Sitaram Magar and defendant No. 2.

6. On being noticed, defendant Nos. 3 to 6 appeared and filed their written statement denying the case pleaded by the plaintiffs, whereas defendant No. 2 admitted contentions and claim of the plaintiffs in toto. In view of the rival pleadings, the issues were framed. The suit was posted for recording evidence of the parties.

7. Before plaintiffs could open their evidence, defendant No. 2 moved an application purported to be an application under Order 18, Rule 16 (Exh. 62) seeking permission of the Court to lead evidence prior to the evidence of the plaintiffs, contending that she was not keeping well and had already suffered heart-attack. This application was opposed by defendant Nos. 3 to 6, present petitioners. However, the trial Court was pleased to allow the said application (Exh. 62) vide its order dated 20th April, 2004. This order is a subject matter of challenge in this petition filed under Article 227 of the Constitution of India. The Arguments :

8. Mr. Oak, learned counsel for the petitioners raised following contentions:--

(a) That under Order 18, Rule 16 of Civil Procedure Code, the defendant No. 2 could not have been permitted to lead evidence prior to the evidence of the plaintiffs.

(b) That the burden to prove the suit claim being on the plaintiffs; it was necessary for them to first step into the witness box and offer their evidence and make themselves available for cross-examination.

(c) That defendant No. 2 has filed her written statement admitting entire case of the plaintiffs pleaded in the plaint and no case was made out by her on additional facts that the plaintiffs are not entitled to any part of the relief which they are seeking in the suit.

(d) That Order 18, Rules 1 and 3A deal with witnesses to be examined. These provisions do not permit the Court to allow any defendant to lead any evidence

prior to the evidence of the plaintiffs. The defendant No. 2 not being a witness of the plaintiffs could not have moved her application under Order 18, Rule 3A of Civil Procedure Code.

(e) That Order 18, Rule 16 also deals with the examination of witnesses. The said provision is not at all applicable to the examination of parties to the suit.

Mr. Oak, based on the above contentions, submitted that the impugned order is unsustainable and liable to be set aside.

9. Per contra, Ms. Gouri Godse, appearing for the respondents tried to support the impugned order, initially, on the basis of the provisions of the Evidence Act, contending that u/s 120 read with Section 135, it was open for the trial Court to exercise discretion. The impugned order being a discretionary order, the same should not be interfered with in the writ jurisdiction of this Court under Article 227 of the Constitution of India. She further tried to barrow support from the provisions of Order 18, Rules 1, 3A and 16 of CPC to support her contentions, however, she could not take her submissions to the logical end; when she was confronted with the fact that defendant No. 2 is not being examined as witness of the plaintiff but she is leading evidence as party-defendant in the suit, that too after admitting entire case of the plaintiffs without making out any case to contend that the plaintiffs are not entitled to any part of the relief which they are seeking.

Analysis of Submissions:

10. Having heard the rival parties, at the outset, it is needless to mention that contention based on Section 120 of the Evidence Act is to be stated merely for rejection. The said Section 120 merely lays down that in all civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses. The reliance on this provision is misplaced. So far as Section 135 of the Evidence Act is concerned, it deals with the order of production and examination of witnesses. It lays down that the production and examination of witnesses shall be regularised by law and practice for the time being relevant to the civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court. In this behalf, it will not be out of place to mention that how and in what order the witnesses are to be produced and examined and the method of recording the evidence is regulated by the provision of Order 18 of Civil Procedure Code. Since the procedure has been laid down under the Civil Procedure Code, reliance on Section 135 will hardly be of any assistance to the plaintiffs.

11. Let me now turn to the provisions of the CPC to examine the strength of the submissions advanced by the rival parties. The provisions of Order 18, Rules 1, 3A and 16 of CPC are as under :

ORDER XVIII HEARING OF THE SUIT AND EXAMINATIONS OF WITNESSES

1. Right to begin.-- The plaintiff has the right to begin unless the defendant

admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks; in which case the defendant has the right to begin.

3-A. Party to appear before other witnesses.-- Where a party himself wishes to appear as a witness; he shall so appear before any other witness on his behalf has been examined, unless the Court; for reasons to be recorded, permits him to appear as his own witness at a later stage.

16. Power to examine witness immediately.-- (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in the manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

12. The object of Order 18 of CPC is primarily to regulate the proceedings in the Court so that the parties may get sufficient opportunity to put up their cases so that their cases may be disposed of as early as possible. The Rules of Order 18 regulating production of additional evidence, rebuttal evidence and power of the Court to summon evidence at any stage must be construed and read in conjunction with each other to achieve the object of this procedural law. It is basic rule of law that wherever ends of justice demands the procedural law should be construed liberally to achieve such ends rather than to scuffle in support of their case.

13. With the above principles in mind, if one turns to the provisions of Order 18 of CPC in seriatim, it would be clear that Rule 1 thereof lays down that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendants, the plaintiff is not entitled to any part of the relief which he seeks, in such case the defendant has the right to begin. The provision of this rule is held to be mandatory by various Courts. This rule contemplates that the plaintiff can examine any witness he so likes; the witness may be a stranger, may be a man of his own party or party himself or may be a defendant or his man. Thus, if the plaintiff wants to examine defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor on the ground that the prayer of the defendant for filing written

statement had been rejected. In terms of the provision of Rule 1 of Order 18, the right or privilege to begin first and, thus, to examine the witnesses first depends on the pleadings of the parties. While ordinarily, it is the plaintiff who begins first, in an appropriate case the defendant may claim such privilege or may be directed by the Court to do so bearing in mind the facts and circumstances of the case.

14. With the above dissection of Rule 1, if one has to understand the legislative intent behind Rule 3A of the said Order 18, which was introduced by the Act 104 of 1976 into Civil Procedure Code, it is necessary to look into the recommendations of the Law Commission. In the 54th report with an intention to prevent the notorious practice indulged "in by litigants in examining other witnesses first and later covering up the gaps by the examination of the parties themselves later, to substantiate their case, the Law Commission recommended introduction of Rule 3-A in Order 18 of Civil Procedure Code. If that is the mischief sought to be remedied by the amended Rule 3-A of Order 18 of Civil Procedure Code, the order of the examination of such of the defendants who wish to examine themselves as witnesses in support of their defence cannot be left to the choice of the plaintiff. Rule 3-A of Order 18 is directory in nature and the only mandatory provision it incorporates is to the extent of obtaining permission of the Court. The normal rule laid down is that the party wanting to examine himself should examine first before any witness is examined. This rule can be deviated only with the permission of the Court. Such permission of the Court, it is desirable, should be obtained before any witness is examined, but such is not the mandate. Such permission can be obtained even at a later stage.

15. So far as Rule 16 of Order 18 is concerned, the scope of this rule is very wide and orders can be passed "at any time after the institution of the suit". This means that an application, in appropriate facts and circumstances, may be moved by the plaintiff even where the defendant has not filed his written statement and issues have not been framed. The fact that the application of the rule is not confined to cases ready for hearing also indicates that by examination of special witnesses it cannot be suggested that the hearing of the suit starts. The rights given to the parties under Order 18, Rule 3-A of CPC is left intact despite a witness having come to be examined long before the commencement of the evidence on either side of the parties to the suit. Order 18, Rule 16 provides for examination of witnesses at the instance of any party at any time after the institution of the suit, which means even before the stage of examination of the witnesses commence in the usual course, as provided for under Order 18, Rules 1 to 3-A of Civil Procedure Code.

16. With the above understanding of the scheme of Order 18 of CPC in general and Rules 1, 1 and 16 thereof in particular; if one turns to the facts of the case in hand, it would be clear that defendant No. 2 is not being examined as witness of the plaintiffs. She is being examined as party-defendant. She has admitted all the allegations or the case pleaded by the plaintiffs. She did not contend that

either in point of law or on some additional facts that the plaintiffs are not entitled to any part of relief which they seek. Had it been so, she would have got a right to begin, with the permission of the Court. However, this is not the case. In this view of the matter, it was not open for the Court to permit examination of defendant No. 2 prior to the commencement of the evidence of the plaintiffs.

17. The submission of Ms. Godse, appearing for the respondents, that defendant No. 2 suffered heart-attack as such one cannot predict the duration of her life. In her submission, defendant No. 2 was rightly allowed to be examined first. Submission made is misplaced. As a matter of fact, in view of the admission of the case of the plaintiffs in the written statement filed by defendant No. 2, it is not open for her to lead any evidence. She is not entitled to lead any evidence in defence, rather she has no defence to prove. It was open for the plaintiffs to examine defendant No. 2 as their witness. At the same time, it was not open for the trial Court to permit her to lead her evidence even before the evidence of the plaintiffs is opened. The plaintiffs ought to have entered first in the witness box. It was open for the trial Court to record evidence on day to day basis considering the request and alleged falling health of defendant No. 2 and considering the nature of the suit and the issues involved. The trial Court could have dealt with the matter more effectively by treating the case as expedited one. The order of the trial Court also does not record any reason as to why defendant No. 2 was permitted to lead her evidence prior to the evidence of the plaintiffs. No reasons are to be found in the order. In the circumstances, the impugned order cannot be sustained for want of reasons. The same is, thus, liable to be quashed and set aside.

18. It is needless to mention that if the plaintiffs desire to examine defendant No. 2 as their witness, then, the plaintiffs shall be at liberty to move proper application before the trial Court. In that event, it would be open for the trial Court to consider such application on its own merits in accordance with law. In that event, plaintiffs shall neither be entitled to use examination-in-chief of defendant No. 2 already recorded by the Court nor shall they be entitled to cross-examine defendant No. 2.

19. In the result, impugned order of the trial Court permitting examination of defendant No. 2 is quashed and set aside. Petition is allowed. Rule is made absolute in terms of this order with no order as to costs.