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(2010) 06 KAR CK 0085

In the Karnataka High Court

Case No : Writ Petition No''s. 9566 of 2008 and 6683 of 2009

P. Satish Pai — APPELLANT

Vs

B. Yeshwanth Shenoy and Others
 Smt. Muniyappa, Sri. T. Ramesh and Sri. T. Srinivasa Vs Sri. H. Yeshwanth Shenoy and Sri P. Satish Pai — RESPONDENT

Date of Decision : 01-06-2010

Acts Referred:
Evidence Act, 1872 — Section 137, 138

Citation : (2010) ILR (Kar) 4022

Hon'ble Judges : Ashok B. Hinchigeri, J

Bench : Single Bench

Advocate : G.L. Vishwanath, in Writ Petition No. 6683/2009 and K. Divakar, for K. Suman, in Writ Petition No. 9566/2008, for the Appellant; K. Divakar, for K. Suman, for R3-5 in Writ Petition No. 6683/2009 and T.N. Viswanatha, for C/R3, for the Respondent

Final Decision : Allowed

Judgement

Ashok B. Hinchigeri, J.—These two petitions are directed against the order, dated 14.12.2005 and dated 20.6.2008 passed by the Court of the XXVIII Additional City Civil Judge, Bangalore in O.S. No. 15030/04. Both these orders are passed turning down the petitioners'' request for permission to cross-examine the co-defendants. W.P. No. 6683/09 is filed by the defendant No. 4 and W.P. No. 9566/08 is filed by the defendant Nos. 1 to 3. To avoid the confusion, the parties are being referred as per their ranks in the Court below.

2. Sri Vishwanath, the learned Counsel for the defendant No. 4 submits that there is conflict of interest between the defendant Nos. 1 to 3 on the one hand and the defendant No. 4 on the other. Therefore, the defendant No. 4 is to be given an opportunity to cross-examine the defendant No. 1. He also brings to my notice, the Trial Court''s order, dated 14.12.2005 (Annexure-G) in W.P. No. 6683/09 appointing the finger print and thumb impression expert for comparing

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the thumb marks and signatures found on the receipts with the admitted thumb impressions and signatures. In the said order while allowing the I.A filed by the defendant No. 4, the Trial Court has observed that the defendant Nos. 1 to 3 could be given an opportunity to cross-examine the Court Commissioner. He submits that the Trial Court made this observation seeing the possible conflict of interest between the defendant Nos. 1 to 3 and the defendant No. 4. Having passed such an order on the 4th defendant''s application for the reference of the signature, thumb impression, etc to the expert and reserved the liberty to the defendant Nos. 1 to 3 to cross-examine the expert, the Trial Court cannot preclude the defendant No. 4 from cross-examining the defendant Nos. 1 to 3 (defendant No. 1 is examined as DW-1 on behalf of the defendant Nos. 1 to 3).

3. Sri Vishwanath also brings to my notice this Court''s decision in the case of Ennen Castings Pvt. Ltd. (In Liquidation) Vs. M.M. Sundaresh and Others, . The relevant paragraph of the said judgment is extracted hereinbelow:

9. As a general rule, evidence is not legally admissible against a party, who at the time it was given had no opportunity to cross-examine the witness or of rebutting their testimony by other evidence. When a two or more persons are tried on the same indictment and are separately defended any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony to criminate them. A defendant may cross-examine his co-defendant who gives evidence or any of his co-defendant''s witnesses, if his co-defendant''s interest is hostile to his own.

4. Sri K. Divakar, the learned Counsel for the defendant Nos. 1 to 3 submits that the plaintiff has filed the suit in collusion with the defendant No. 4. Unless the defendant No. 4 transposes himself as the co-plaintiff, the defendant No. 4 cannot be permitted to cross-examine the defendant Nos. 1 to 3, so contends Sri Divakar. He further submits that because of the collusion between the plaintiffs and the defendant No. 4, the need has arisen for the defendant Nos. 1 to 3 to cross-examine the defendant No. 4.

5. The sole point that falls for my consideration is:

a) Whether a co-defendant has the right of cross-examining the deposing defendant in case of conflict of interest between the two?

6. If there is conflict of interest between the two co-defendants or two sets of co-defendants, one co-defendant or one set of co-defendants must have the opportunity of cross-examining the other co-defendant or the other set of co-defendants and vice versa. In the instant case, what cannot be lost sight of is that the Trial Court has already made an observation in the context of allowing the fourth defendant''s application for referring the matter to the expert that the defendant Nos. 1 to 3 could be given an opportunity to cross-examine the expert. This raises the possibility of the existence of conflict of interest between the defendant Nos. 1 to 3 and the defendant No. 4. Of course, whether there is any collusion between the plaintiffs and the defendant No. 4 is something, which

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can be decided only on the conclusion of the trial.

7. It is profitable to refer to Rajasthan High Court''s judgment in the case of Sohanlal and Ors. v. Gulab Chand reported in AIR 1966 Raj 229. In the said case the view that if the witness of a defendant makes any statement which is injurious to the co-defendants, they have a right to cross-examine, is accepted. It would be unjust and unsafe not to allow a co-defendant to cross-examine a witness called by one whose case is adverse to his, or who has given evidence against him.

8. It is also beneficial to refer to the decision of Punjab and Haryana High Court in the case of Sadhu Singh Vs. Narain Singh Sewadar and Others, , wherein it is held that Section 138 of Evidence Act, 1872 allows the right of cross-examination of a witness to an adverse party. Where the parties arrayed as defendants in a suit have taken contradictory stands on a relevant and material issue, they shall be adversary to each other and are entitled to exercise their right of cross-examination against each other.

9. The Trial Court has wrongly disallowed the two I.A.s for cross-examining the co-defendants. Therefore I quash both the impugned orders dated 14.12.2005 and 20.6.2008 and permit the defendant Nos. 1 to 3 to cross-examine the defendant No. 4 and vice versa, that is, the defendant No. 4 to cross-examine the defendant Nos. 1 to 3. However the allowing of these petitions and acceding to the prayer of the parties for cross-examination is in a qualified way. The cross-examination has to be allowed only to the extent of clash of interest between the defendant Nos. 1 to 3 and the defendant No. 4. In issuing this clarificatory direction, I am restating what Punjab and Haryana High Court held in para 2 of its decision in the case of Kartar Singh v. Thakur Singh and Ors. reported in 2002 A.I.H.C. 3683. The said paragraph is extracted hereinbelow:

2. After hearing the learned Counsel, I am of the considered opinion that the impugned order passed by the learned Civil Judge is in consonance with the provisions of Sections 137 and 138 of the Act and the judgment relied upon by the learned Counsel. The Civil Judge is conscious of the fact that cross-examination is to be allowed only to the extent of clash of interest of the co-defendant. It has also been taken care of that if at later stage the Court finds the defendants were colluding, the same would be appreciated by the Court at the appropriate stage.

10. Both the petitions are allowed to the extent indicated in paragraph No. 9 hereinabove. No order as to costs.

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