

(2005) 06 KAR CK 0022
In the Karnataka High Court
Case No : Writ Petition No. 47140 of 2004

Rehana Begum

APPELLANT

Vs

Mirza M. Shaiulla Baig and Others

RESPONDENT

Date of Decision : 02-06-2005

Acts Referred:

Evidence Act, 1872 — Section 137, 154

Citation : AIR 2005 Kar 446 : (2006) 1 CivCC 514 : (2005) ILR (Kar) 5010 : (2006) 4 KarLJ 195 : (2005) 4 KCCR 2495 : (2006) 1 RCR(Civil) 69 : (2006) 1 RCR(Civil) 68 : (2006) 1 RCR(Criminal) 72

Hon'ble Judges : Ajit J. Gunjal, J

Bench : Single Bench

Advocate : Bridy Aiyappa, for Sreevatsa Associates, for the Appellant; S.G. Krishnamurthy, for R-1(a) to (c), R-2, 3 and 4: R-5, for the Respondent

Final Decision : Dismissed

Judgement

Ajit J. Gunjal, J.—The facts leading to the present petition can be summarised as follows:

The petitioner is the plaintiff. O.S.No. 8201/1980 is filed by her for declaration and consequential relief of injunction and also to re-open the judgment and decree passed in O.S.No. 290/1975. A copy of the plaint thereof is produced at Annexure-A. The reason for instituting such a suit is not required to be stated for disposing of this petition. Suffice it to say that O.S.No. 290/1975 was filed by the petitioner herein and respondent No. 6-Rizavane Begum. Mr. Narasimha Murthy was the Learned Counsel who was appearing for the defendants in the said suit. Respondent No. 7 who is none other than the sister of petitioner filed a suit in O.S.No. 7804/1980, for an identical relief to avoid compromise decree in O.S.No. 290/ 1975. In the said suit, i.e., O.S.No. 7804/1980, Mr. Narasimha Murthy, who was appearing for the contesting defendants in O.S.No. 290/ 1975 retired from the proceedings and was examined as D.W.2 and he supported the defendants and also the compromise decree passed in O.S.No. 290/1975. It is also not

disputed that the said suit was dismissed and the judgment and decree passed in O.S.No. 290/1975 is confirmed as respondent No. 7 cannot avoid such a decree as she was party to the proceedings (SIC). When the present suit instituted by the petitioner is pending trial, an application IA No. 21 is filed by the petitioner under Sections 137 and 154 of the Indian Evidence Act seeking permission of the Court to put such questions to the said witness as adverse party would put in a cross-examination as contemplated u/s 154 of the Evidence Act. In the said application though the provisions of the Indian Evidence Act, viz., Section 137 and Section 154 were invoked, the said application was resisted by the defendants, inter-alia, contending that the said witness viz., Mr. Narasimha Murthy having not been examined and that he had not turned hostile, the applications invoking Sections 137 and 154 are not maintainable and at best would be termed as premature. The Learned Trial Judge has accepted the said contention and was of the opinion that in the absence of any evidence which would run contrary to the interest of the plaintiff/petitioner, the question of invoking Section 154 in the present set of circumstances cannot be accepted and has rejected the said application, as against which the present petition is filed. The impugned order is produced at Annexure-D.

2. Smt. Birdy Aiyappa, Learned Counsel appearing for the plaintiff-petitioner would contend that the circumstances in which the petitioner is placed, there is every apprehension that Mr. Narasimha Murthy, Counsel appearing for the defendants in the earlier proceedings would not support her case. Apprehending such hostility, the present application u/s 154 was filed so as to put such questions which are normally put to a party in a cross-examination by an adverse party. She would further submit that Mr. Narasimha Murthy having given evidence on behalf of the defendants in the earlier suit filed by petitioner's sister viz., R-7, Mr. Narasimha Murthy supporting her case is remote. In the circumstances, there is every justification for allowing the said application.

3. Sri S.G Krishna Murthy, appearing for the respondents would submit that in the absence of any evidence that he may turn hostile, the question of the plaintiff-petitioner invoking Section 154 does not arise at all. The sum and substance is that the Learned Trial Judge was justified in rejecting the application.

4. The only question which requires to be addressed in this petition is whether the application filed by the plaintiff-petitioner invoking Section 154 of the Evidence Act is justifiable?

5. Section 154 of the Indian Evidence Act reads as under:

"The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party".

Section 154 of the Indian Evidence Act would contemplate a situation where a party calling a witness and on examining him discovers that the witness is hostile, he can seek permission of the Court to put questions to him which may

be put to him by way of cross-examination. Apparently, in this case it is noticed that Mr. Narasimha Murthy who had appeared for the defendants in the earlier suit had given evidence in OS No. 7804/1980 which was filed by the sister of the petitioner for identical relief. But however, the question here is whether Mr. Narasimha Murthy is called as a witness in this case. He is not yet examined. A reading of the affidavit filed in support of the application would only state that there is every possibility of Mr. Narasimha Murthy not supporting the case. There is no positive indication that he will not support the case of the petitioner. It is no doubt true that Mr. Narasimha Murthy who was examined on behalf of the defendant as D.W.2., did not support respondent No. 7 in the earlier suit. But however, that by itself cannot be a ground wherein Section 154 of the Indian Evidence Act can be invoked. Infact, an identical question fell for consideration before this Court in the case of Shivamurthy Swamy v. Agodi Songanno AIR 1969 Mys 12. The Scope of Section 154 of the Indian Evidence Act has been stated very clearly in the decision. It is useful to extract the observation made by the Court in the said decision at paras-16 and 19 which would read as follows:

. . .

16) In normal cases where it can fairly be assumed that a party calling a witness represents to the Court that he is a trustworthy witness, an occasion for the party calling him to seek permission u/s 154 of the Evidence Act can arise only where he unexpectedly gives an answer which is adverse to his case. Even there, it is not enough if the party feels that the witness is hostile to him; it is necessary that the Court should come to entertain an opinion that the witness has such hostile animus against the party calling him as to be inspired by a desire to speak the untruth or not to speak the truth.

. . .

19) With reference to cases of witnesses like an attesting witness whom the law obliges a party to examine, Mukherjee J., has in Surendra Krishna Mondal Vs. Sreemati Ranee Dassi, pointed out that it is a wrong law to assume that such witnesses must be regarded as witnesses called by the Court and liable to be cross-examined as of right by the party citing them. His Lordship states that a witness should be regarded as adverse and liable to cross-examination by the party calling him only when, in the opinion of the Court he bears hostile animus to the party calling him and further that that a hostile witness in the real sense is one who from the manner in which he gives him evidence shows that he is not desirous of telling the truth".

6. It is no doubt true that whenever a witness is examined on behalf of a person who seeks support from his evidence and if the said witness gives evidence to the detriment of the person who has called him as a witness, the person who has called the witness can cross-examine him. But however, as stated earlier in the said judgment, that situation will arise when there is a positive statement that there is a material departure and the evidence given by the witness is detriment

to the person who called him as a witness.

7. Further in Shri Rabindra Kumar Dey Vs. State of Orissa, the Apex Court has held that:

"A party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth."

This observation made by the Apex Court would make it abundantly clear that the Courts cannot presuppose that there is every likelihood that the witness will turn hostile and not support the case. There must be something concrete before the Court to come to a conclusion that it should permit cross-examination of the witness as contemplated u/s 154 of the Indian Evidence Act.

8. The Learned Counsel for the petitioner also relied upon a decision of the Apex Court in the "case of Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, where according to her it is held that it is really not necessary for the witness to give evidence against a person who called him as a witness to cross-examine him and an apprehension that he is not likely to support the case is a good reason for the Court to exercise powers u/s 154 of the Evidence Act and permit the party to cross-examination his own witness. To my mind, the reading of the Judgment does not give such an indication. In fact, this decision fell for consideration in the earlier cited Supreme Court decision reported in Shri Rabindra Kumar Dey Vs. State of Orissa, . Taking into consideration the observation made by the Supreme Court in the said decision that unless there are compelling reasons, the Court shall not permit the party to invoke Section 154 of the Evidence Act, I do not find any merit in this writ petition. The writ petition stands rejected. But however, it is open to the petitioner to make an application if ultimately the evidence of the witness does not support her case and seek permission to cross-examine the witness. If such an application is made, the same shall be considered by the Trial Court in accordance with law.