
(2009) 09 KAR CK 0014

In the Karnataka High Court

Case No : Writ Petition No's. 15858 and 15859 of 2007

Shree Financiers (R)

APPELLANT

Vs

Smt. Bhagyamma and Others

RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1, Order 16 Rule 2, Order 18 Rule 17, 151

Citation : (2010) 1 KarLJ 337

Hon'ble Judges : Ashok B. Hinchigeri, J

Bench : Single Bench

Advocate : B. Ramesh, for the Appellant; K.V. Narasimhan, for Respondents-1 and 3 to 5, for the Respondent

Judgement

Ashok B. Hinchigeri, J.—As the common questions of facts and law are involved in the two petitions, they are clubbed and are being disposed of by this common order.

2. The facts of the case in brief are that the petitioner filed O.S. No. 104 of 1998 against the respondents for the recovery of a sum of Rs. 57,386/- with interest. Based on the rival pleadings, the issues were framed. The parties have lead and concluded their side of the evidence. Further both the sides have also argued out the case on merits. When the matter was set down for the reply of the petitioner-plaintiff, it filed two I.As. I.A. No. 9 for the condonation of delay in filing the list of witnesses as it wanted to examine the Bank Manager, Karnataka State Industrial Co-operative Bank, Chikkaballapur Branch and I.A. No. 10 to recall the stage from further arguments on merits to further evidence of the petitioner. The Trial Court, by its order, dated 17-9-2007 dismissed both the I.As. with cost. Feeling aggrieved by the said order, this petition is presented.

3. Sri Ramesh, the learned Counsel for the petitioner submits that the Trial Court has dismissed I.A. No. 10 mainly on the ground that Order 18, Rule 17-A is deleted. He brings to notice that the petitioner has invoked Order 18, Rule 17

read with Section 151. According to him, Order 18, Rule 17 provide for leading further evidence. In the alternative, he submits that if Order 18, Rule 17 has no application, then the Trial Court ought to have considered his I.A. u/s 151 of the Civil Procedure Code, 1908. His further grievance is that there is no consideration whatsoever of the I.A. No. 9 filed invoking the Order 16, Rules 1 and 2 read with Section 151 of the CPC for the condonation of delay in filing the list of witnesses.

4. Sri K.V. Narasimhan, the learned Counsel for the respondents submits that under Order 16, Rule 1(3), a witness whose name does not appear in the list of witnesses may be called; but the said provision can have no application for a case where no list of witnesses is filed. He further submits that the petitioner has come out with the I.As. in question only when the flaws are pointed out by the respondents in the course of the arguments. He submits that the petitioner cannot overcome the lacunae by making I.A. Nos. 9 and 10.

5. My perusal of the impugned order reveals that one of the reasons for dismissing the I.A. No. 10 is that Rule 17-A is deleted by the Amendment Act, 1999. I am afraid this reasoning is not sustainable. But that does not mean that the order has to be reversed and I.A. No. 10 has to be allowed. The provisions contained in Order 18, Rule 17 under which I.A. No. 10 is filed reads as follows.--

17. Court may recall and examine witness.--The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such question to him as the Court thinks fit.

6. The plain reading of the said provision reveals that the witness who has already been examined can be recalled. The said provision cannot be pressed into service for issuing summons to a fresh witness. On this ground only, the application filed under Order 18, Rule 17 is liable to be rejected.

7. The petitioner cannot fall back upon Section 151 of the CPC, as the Legislature had inserted Rule 17-A by Act 104 of 1976 providing for the production of evidence at a later stage, if a party satisfies the Court that despite the exercise of due diligence, he could not produce the same when he was leading his evidence. In exercise of its wisdom, the Legislature repealed it by Act 46 of 1999. With due deference to the legislative intent, the power conferred by Rule 17-A but taken away subsequently by the repeal of the said provision cannot be exercised by invoking Section 151 of the CPC.

8. Now the petitioner's grievance over the non-consideration of I.A. No. 9 has to be considered. Sri Ramesh is right in contending that there is no consideration of I.A. No. 9. I propose to consider I.A. No. 9 in these proceedings instead of remanding the matter to the Trial Court for considering the same. I.A. No. 9 is filed invoking the Order 16, Rules 1 and 2. The said provisions are as follows.--

1. List of witnesses and summons to witnesses.--(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which

the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in Sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of Sub-rule (2), summonses, referred to in this rule may be obtained by parties on an application to the Court or to such officer as may be appointed lay the Court in this behalf within five days of presenting the list of witnesses under Sub-rule (1).

2. Expenses of witness to be paid into Court on applying for summons.--(1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, which shall not be later than seven days from the date of making application under Sub-rule (4) or Rule 1, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2). Experts.--In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3). Scale of expenses.--Where the Court is subordinate to a High Court regard shall be had in fixing the scale of such expenses, to any rule made in that behalf.

(4). Expenses to be directly paid to witnesses.--Where the summons is served directly by the party on a witness, the expenses referred to in Sub-rule (1) shall be paid to the witness by the party or his agent.

9. Rule 2 of Order 16 has no application whatsoever, as the provisions contained therein deal with the expenses of the witness. As far as Rule 1 of Order 16 is concerned, I am not in a position to give acceptability to the submissions urged by Sri Narasimhan. His submission as noted earlier is that unless the list of witnesses is filed, a fresh witness cannot be summoned. Because it is possible to take the view that not filing the list of witnesses and a witness's name not figuring in the list of witnesses create more or less similar situation. Therefore I negative his submission by holding that if a party shows sufficient cause for calling a particular witness, it can be considered by the Trial Court in exercise of its discretion. However the provision for calling the witness is something, which cannot be claimed as a matter of course or as a matter of right; it is only an

enabling provision. In the instant case, I.A. No. 9 has got to be tested on the touchstone of whether or not the petitioner-plaintiff has shown the sufficient cause for not examining him. I have gone through the affidavit filed in support of I.A. No. 9. My reading of the same does not reveal that the petitioner has exercised due diligence in the matter or that he has shown sufficient cause.

In the result, I dismiss both the petitions by confirming the impugned order but for different reasons given hereinabove.

No order as to costs.