
(2010) 01 OHC CK 0031
In the Orissa High Court

Soubhagya Mohanty

APPELLANT

Vs

Harekrushna Mohanty and Others

RESPONDENT

Date of Decision : 14-01-2010

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 151

Citation : (2010) 109 CLT 647

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanju Panda, J.—In this writ application, challenge has been made to the Order Dtd 11.11.2009 passed by the Learned Civil Judge (Senior Division), BBSR in Civil Suit No. 595 of 2005 rejecting an application to recall the Plaintiffs' witness for further cross-examination.

2. The facts as narrated in the writ application are as follows:

The Plaintiffs who are Opp. Party Nos. 1 & 2 filed the suit for cancellation of a sale deed, declaration of title, confirmation of possession & permanent injunction with other reliefs. The present Petitioner is Defendant No. 1 & the proforma Opp. Party No. 3 is Defendant No. 2. However, the present Petitioner who is only contesting the suit filed his written statement. In course of hearing of the suit, the evidence of both sides was closed & the suit was posted for argument. At that stage, Defendant No. 1 engaged a new Counsel. After going through the pleadings & the evidence adduced by the parties, the newly engaged Counsel felt it essential that P.W.1 who was Plaintiff No. 1 be recalled for further cross-examination as questions on several material aspects had not been put to him during his cross-examination. The conducting Counsel appearing for Defendant No. 1 filed an application Under Order 18, Rule 17 read with Section 151 of the CPC giving the particular material aspects & the possible questions to be put to P.W.1 for further cross-examination which could not be put to him earlier due to

omission of the previous conducting Counsel on the date to which the suit was posted for argument. The Plaintiffs filed their objections to the said application stating therein that Defendant No. 1 was trying to fill up his lacuna as P.W.1 was earlier examined & cross-examined & also re-examined on recall.

3. After considering the plea of the Petitioner & the objection filed by the Plaintiffs, the Trial Court rejected the said application on the ground that the suit is in its fag end of hearing & P.W.1 has been exhaustively cross-examined by the previously engaged Advocate. The newly engaged Advocate filed the application with 16 material points to be asked in the further cross-examination as to possession, partition, state of health, suspension, construction of house respectively. If the Defendant is allowed to recall P.W.1 & ask those questions, it will amount to patching up & covering the lacuna left out after strenuous cross-examination by the previously engaged Advocate. It will cause prejudice to the Plaintiffs. Again de novo trial will begin, as the Plaintiffs will also attempt to counter the adverse materials that may likely arise in the evidence.

4. Learned Counsel for the Petitioner submitted that the Trial Court should have considered the merit of the application without being influenced by the stage of the suit. Since Order 18, Rule 17, CPC stipulates that at any stage a witness can be recalled & if the same is necessary, the Court may at any stage of a suit recall any witness who has been examined & may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit. In support of his contention, he cited the decisions reported in *Om Parkash Vs. Sarupa and Others*, *Suresh Kumar Vs. Baldev Raj*, 2005 (Supp) OLR 791 (Sk. Mustafa and Anr. v. Additional Dist. Judge, Jaipur and Ors) where it has been held that the stage of the case alone should not weigh with Court to such an extent as to overshadow other aspects of the matter & the vital questions not put to the witness due to lapse of Counsel. In such a situation the witness can be recalled & cross-examined.

5. Learned Counsel for the Opp. Parties submitted that P.W.1 was earlier recalled & cross-examined on the ground that the conducting Counsel had not cross-examined the said witness & they had approached this Court by filing W.P.(C) No. 4721 of 2009 which was disposed of on 8.4.2009. As per the direction of this Court, the said witness was re-examined. After he was re-examined, again Defendant No. 1 changed the Counsel & filed another application & successive application for the self-same purpose is not maintainable.

6. Considering the above rival contentions of the parties, this Court is to determine whether further cross-examination of P.W.1 is necessary in such a situation for just decision of the case. The provision of Order 18, Rule 17 CPC does not enable a party to claim the privilege of recalling the witnesses examined in chief by his opponent for the purpose of cross examination. The discretion vests in the Court to recall a witness who has been examined at any time before the delivery of Judgment. Cross-examination of a witness who has been examined by the adverse party, if necessary for ends of justice, can be permitted

by recalling the witness & such discretion must be exercised judicially & on well accepted judicial principles & not arbitrarily or capriciously. Recalling a witness depends upon the facts & circumstances of each case. The Court should exercise the discretion with an aim for giving full opportunity to the parties to present their case & not to fill up their lacuna or drag the proceeding.

7. (SIC) In the present case, it is the admitted fact that the witness P.W.1 was earlier examined & cross-examined. He was also further cross examined as per the direction of this Court in W.P.(C) No. 4721 of 2009 on recall. In spite of the said opportunity, Defendant No. 1 did not cross-examine the said witness fully nor did he reserve any right as provided Under Order 18, Rule 3, CPC to further cross-examine the said witness & the questionnaire formulated to cross examine the said witness on recall is not so relevant for just decision of the case as the said witness was already cross-examined on recalled. Plaintiff No. 1 is none other than the father of Defendant No. 1 (eldest son) & Defendant No. 2 is the daughter in law (wife of younger son) & the parties are Hindus & governed under Mitakshara School of Hindu Law.

8. The decisions cited by the Learned Counsel appearing for the Petitioner are not applicable in the present facts & circumstances of the case & hence the same are not necessary to be taken into consideration. In the present case, the witness whom the Petitioner wants to recall for re-cross examination was earlier after closure of his examination-in-chief & cross-examination recalled as per direction of this Court in W.P.(C) No. 4721 of 2009 & on such recall the said witness was cross-examined at length on the ground of lapse & change of Counsel, If successive applications are filed by a party on the same plea, the Trial Court has to deal with the same being in a position to infer the intention of the party appearing before it. It is well settled that a little difference in the facts or additional facts may make a lot of difference in precedential value of a decision. Judicial utterances are made in setting up of the facts of a particular case. Therefore, the above decisions are not applicable to the facts of the present case.

9. In view of the aforesaid discussions, there is no error apparent on the face of the impugned order passed by the Trial Court. Hence, in exercise of the jurisdiction Under Article 227 of the Constitution of India, this Court is not inclined to interfere with the same. Accordingly, the writ application is dismissed.