

(1991) 11 OHC CK 0003

In the Orissa High Court

Case No : Civil Revision No. 930 of 1986

Sunakar Gochhayat and Others

APPELLANT

Vs

Dhaneswar Barik and Others

RESPONDENT

Date of Decision : 13-11-1991

Acts Referred:

Evidence Act, 1872 — Section 154

Citation : (1992) 73 CLT 851 : (1992) 1 OLR 149

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : P. Kar and D.K. Sahoo, for the Appellant; Samareswar Mohanty, S.C. Mohanty, R.C. Sahoo and S.L. Patnaik for O.Ps. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—The question to be decided in this, revision is, if rejection of the application filed by petitioners 1 to 4 to cross-examine the witness (DW 1) is justified.

Shankar, Chakradhar and Ankura were three brothers, Doli (Defendant No. 6) and Banamali (defendant No. 7) are the legal representatives of defendant No. 4. Court (defendant No. 5) is the legal representative of Ankura. Plaintiffs purchased the disputed property from Chakradhar whereas defendant Nos. 1 to 4 purchased a portion of the disputed property from defendant Nos. 5, 6 and 7. Purchases were almost contemporaneous, plaintiffs' being 4 days earlier than that of defendant Nos. 1 to 4. The question that arose in the suit for permanent injunction was, if the property was the exclusive property of Chakradhar or was the joint property of Chakradhar and defendants, 5, and 7 and if the plaintiffs were in possession.

2. After conclusion of evidence adduced by the plaintiffs, the defendants examined their witness Michhu (DW 1) on 10-12-1986. After the cross-examination was over, the petitioners, who were defendants 1 to 4. without re-

examining him filed an application making a prayer to the Court to allow them to cross-examine him after declaring him hostile. Said prayer having been rejected/ this revision has been filed. The trial Judge rejected the prayer holding that merely because the witness made some statements damaging to the defendants 1 to 4 during his cross-examination by the plaintiffs, that was not a justification for declaring him hostile and permitting defendants 1 to 4 to cross-examine him.

3. To appreciate the point it, is necessary to remember that the witness was called to depose about two aspects, namely, (a) jointness or otherwise to Chakradhar. Doli, Banamali and Gouri, and (b) possession. In his examination-in-chief he stated that Shankar and Ankura were working at Calcutta and sending money to Chakradhar through him. Chakradhar was managing the family as Karta and he had no independent income. Bira and his brother were using to Cultivate the property since about 10 to 16 years on behalf of Doli and Gouri. in cross-examination, he stated:

".....Whatever we were earning the entire was spent at Calcutta.....Plaintiffs have been possessing the suit land since about 8 years having purchased it.

4. The moot question for consideration is, if the aforesaid statements of the witness justified invoking Section 154 for the purpose of putting this question in the nature of cross-examination. Section 154 of the Evidence Act reads as under;

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

An exhibition of hostile animus is not the sole test of declaring a witness adverse because such a test would frustrate the object in many cases like where a shrewd and composed witness might, by concealing his real sentiments or hostile attitude, give unfavourable evidence and make statements contrary to the facts, known to him and what the party calling him expected him to say nor can the witness merely giving unfavourable testimony be enough to declare him adverse, for he might be telling the truth which may go against the party calling him.

He is hostile, if he tries to injure the party's case by prevaricating or suppressing the truth ; when his temper, attitude, demeanour, bearing, etc. in the witness box show a distinctly antagonistic feeling or a mind hostile to the party calling him or when concealing his true sentiments he does not exhibit any hostile feeling, but makes statements contrary to what he knew and was called to prove or what he had deliberately told before and by his manner of giving evidence and conduct shows that he is suppressing the truth, or that he is not desirous of giving evidence fairly and telling the truth to the Court with a view to help the other party. A witness who is unfavourable is not necessarily hostile.

But the matter as to whether permission should or should not be granted to cross-examine one's witness whatsoever hostile he may appear to be eminently

is one in the discretion of the trial Judge and his discretion under various circumstances is not open to challenge.

5. The Supreme Court in *Shri Rabindra Kumar Dey Vs. State of Orissa*, , observed;

"The section confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion, it is, however, well-settled that the discretion must be judiciously and properly exercised in the interests of justice. The law on the subject is well settled 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 realised 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....before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking - the truth or has exhibited an element of hostility to the party for whom he is deposing."

It further observed;

"Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed;"

In *Sat Paul Vs. Delhi Administration*, , it has been said:

"The discretion conferred by Section 154 on the Court is unqualified and untrammelled, and is apart from any question of "hostility." it is to be liberally exercised whenever the Court from witness's demeanour temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness."

Against the back-ground of the aforesaid exposition of law, it is to be seen if the discretion exercised by the trial Court in refusing the prayer was against all canons and principles. It is not law and cannot be that whenever any statement is elicited in the cross-examination of a witness which is prejudicial or adverse to the party who has called him, an opportunity shall be given to the party concerned to cross-examine him. Such a view would frustrate and destroy the purpose of cross-examination. That is why it has been said that merely because the witness had made some statements which go against the party who has called him, the discretion should not automatically be exercised in favour of the

party. Michhu Pagal (D. W. 1) had clearly stated in his examination-in-chief that Bira and his brother used to cultivate the disputed property on behalf of Doli and Gouri since about 10 to 16 years. That was a positive and categorical statement during the examination-in-chief. In the cross-examination he, however, stated that the plaintiffs had been possessing the disputed property since about 3 years having purchased it. It is not, therefore, a clear case of the witness making his statement under stress of cross-examination or in an unguarded moment which is unfavourable to the party calling him. It is a case where the Court was obligated to arrive at the truth by permitting defendants 1 to 4 to cross-examine Michhu. If the facts and circumstances justified, grant of permission u/s 154 will not stand forfeited by reason of the fact that the prayer was made after the witness was discharged, though as in this case the prayer was made immediately after the witness was discharged on the date of his examination itself. It cannot be laid down as an immutable principle that the prayer must be made before the witness is discharged. That is a discretion of the Court I am, therefore, of the view that the discretion vested in the Court was not judiciously exercised. I, therefore, vacate the impugned order and permit defendants 1 to 4 to put Michhu Pagal (D. W. 1) questions in the nature of cross-examination.

6. In the result, the revision is allowed but there would be no order as to costs.