

(2011) 07 KL CK 0141
In the High Court Of Kerala
Case No : O.P. (C) No. 2060 of 2011

Thavarayil Salim

APPELLANT

Vs

Saru Umma

RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2)
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 73

Citation : (2011) 3 ILR (Ker) 376 : (2011) 3 KLJ 348 : (2011) 4 RCR(Civil) 273 : (2011) 3 RCR(Civil) 835 : (2011) 4 RCR(Civil) 273

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : P.U. Shailajan, for the Appellant;

Final Decision : Dismissed

Judgement

K.T. Sankaran, J.—The question of law involved in this Original Petition is whether the Plaintiff in a suit for specific performance of a contract for sale can seek to implead the attesting witness to the agreement as additional Defendant in the suit, invoking Rule 10(2) of Order I of the Code of Civil Procedure, on the ground that she is likely to deny her signature in the agreement.

2. The Petitioner filed O.S. No. 297 of 2008 on the file of the Court of the Munsiff of Kuthuparamba against the Respondent for specific performance of an agreement for sale in respect of the plaint schedule property. The Defendant denied the agreement and her signature in the agreement. She contended that there was no agreement for sale between her and the Plaintiff. The Defendant also denied the signature of her daughter as an attesting witness in the agreement. According to the Defendant, the agreement produced along with the plaint is a "false and fabricated document created by the Plaintiff by forging the signature of the Defendant and her daughter Maymoona".

3. The Petitioner/plaintiff filed an application under Rule 10 of Order I of the CPC

to implead Maymoona, the attesting witness, as supplemental Defendant No. 2. The Plaintiff also filed an application for consequential amendment of the plaint. In the affidavit in support of the application for impleading, the Plaintiff stated thus:

The Defendant had disputed the execution of the sale agreement containing her signature as well as the writings and signatures of her daughter Maymoona. The said contention is false. Further she had also refused to admit the handwritings and signature of Maymoona appearing on the agreement. It is with a view to avoid taking of steps and the proof of the agreement..... In the circumstances in order to take necessary steps for proving the sale agreement and to get the effective adjudication of the dispute it is necessary that the said Maymoona is impleaded.

4. The Defendant opposed the applications for impleading and amendment of the plaint. She contended that there is no averment in the plaint regarding the role of Maymoona in the transaction. Simply because the Defendant disputed her signature and that of her daughter in the agreement, impleadment of the attesting witness as an additional Defendant is not warranted. For the effective adjudication of the suit, it is not necessary to implead Maymoona as an additional Defendant.

5. The court below dismissed the applications holding that Maymoona is not a necessary or proper party. The court below held that "it cannot be said that the presence of the supplemental Defendant would be necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit". The order passed by the court below is under challenge in this Original Petition filed under Article 227 of the Constitution of India

6. Sri P.U. Shailajan, the Learned Counsel for the Petitioner submitted the following: (a) If the supplemental Defendant is impleaded, the Plaintiff can serve interrogatories on her; (b) The Plaintiff can also take steps to compare her signature with admitted signatures; (c) If the attesting witness denies her signature while giving evidence, the court would not be inclined to seek the assistance of an expert to compare her signature; (d) Specimen signature of the attesting witness cannot be taken u/s 73 of the Evidence Act so long as she is not a party to the suit. The counsel also relied on the decision of the Supreme Court in *Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and others*"1".

7. Sub-rule (2) of Rule 10 of Order I of the CPC reads thus:

(2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to

enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

8. In *Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and others*¹, the Supreme Court on considering the scope and ambit of Rule 10(2) of Order I CPC held thus:

A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the Plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the Plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

9. The power under Sub-rule (2) of Rule 10 of Order I can one exercised either suo motu or on application. That power can be exercised either to strike out or add parties. Addition of parties can be at the instance of the Plaintiff or at the instance of a person who is not party to the suit. The plaintiff may seek to implead a person as additional Defendant who is either a necessary or proper party. Sometimes, the Defendant may raise a contention that a person has interests in the subject-matter of the suit and that his interests would be affected if a decree were to be passed. The Defendant may, in some cases, raise a contention that a person is a necessary party and without impleading him, the suit is not maintainable. In such cases, the Plaintiff may make an application to implead such proper party or necessary party, as the case may be. Such an application would, normally, be allowed by the court, unless the court finds that presence of such person is not necessary at all. In some cases, a person who is not a party to the suit, may apply to the court to implead him as an additional Defendant stating that he would be affected by the decision that may be taken in the suit. If the court finds that he is a necessary party or proper party, he would be impleaded as an additional Defendant. The person sought to be added should have a direct interest in the subject-matter of the suit. The yardstick to be applied while considering an application filed by the Plaintiff to implead an additional Defendant may not be the same while considering an application by a person who wants to get himself impleaded against the wishes of the Plaintiff. The Plaintiff is the dominus lit is. Normally he would not be compelled to fight a litigation against a person with whom he does not want to fight and from whom he does not want to get a relief. But the court may, even against the wishes of the Plaintiff, add such person as an additional Defendant, if the court finds that he is a necessary party and he ought to have been joined as a party to the suit.

The court may also allow a third person to come on record as an additional Defendant if his rights are likely to be affected by the decree that may be passed in the suit and whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. If the Plaintiff arrays an unnecessary person as a Defendant, such Defendant may apply to strike out his name on the ground that he was improperly joined as a Defendant. The striking out or adding of parties is in the realm of judicial discretion of the Court, which will be exercised in the light of the principles underlying Sub-rule (2) of Rule 10 of Order I Code of Civil Procedure

10. In the matter of addition of parties, Rule 10(2) of Order 1 CPC consists of two parts: (1) adding the name of a person who ought to have been joined, whether as Plaintiff or Defendant; or (2) adding the name of a person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The purpose and intent of the sub-rule is clear. In the first category mentioned above, the Court will not decide a case on the merits without the presence of the person, in whose absence the case cannot be decided at all. Such person is a necessary party to the suit. Even though a person is not a necessary party, but his presence would enable the Court effectually and completely to adjudicate upon and settle the questions involved in the suit, such person can be impleaded as a proper party. The second category mentioned above pertains to proper parties. When a person is neither a necessary party nor a proper party, the Court would not allow him to be added as a party to the suit. The scope of the suit cannot be enlarged and questions which are not involved in the suit cannot be decided, simply by adding parties. Such addition of parties is not contemplated under Sub-rule (2) of Rule 10 of Order I. Adjudication of matters which should be decided and settled in a separate suit between any of the parties in the suit on the one hand and a third person on the other, is not the object of addition of a party under Sub-rule (2) of Rule 10 of Order I Code of Civil Procedure

11. An attesting witness to an agreement for sale is neither a necessary party nor a proper party to a suit for specific performance. Grant or refusal of the relief of specific performance of a contract for sale is not dependant on the presence of the attesting witness to the agreement as a party to the suit. So long as the right or liability of an attesting witness is not involved in the suit, he is neither a necessary party nor proper party to the suit. An attesting witness to the agreement for sale is not a person who would be affected by the decree. An attesting witness need not know the contents of the document. By reason of mere attestation of a document, it is not possible to attribute to an attest or the knowledge of the contents of a document. [See Ganesh Bhandary v. Ambunhi¹²¹].

12. In order to decide whether the person concerned put his signature as an

attesting witness in an agreement for sale, it is not necessary that he should be made a party to the suit for specific performance of the contract for sale. The apprehension of the Plaintiff that while adducing evidence, the attesting witness may turn hostile and deny his signature in the agreement is not a ground to implead him as an additional Defendant in the suit. The contention put forward by the counsel for the Petitioner that if the attesting witness is made a party to the suit, interrogatories could be served on her, is not a ground to implead her as additional Defendant. Interrogatories can be served by a party to the suit on the opposite party, as provided under Rule 1 of Order XI C.R.C. Sub-rule (2) of Rule 10 of Order I does not contemplate addition of a person, who is neither a necessary party nor a proper party, as additional Defendant in the suit, in order to enable the Plaintiff to serve interrogatories on him. Addition of parties under Sub-rule (2) of Rule 10 of Order I is neither dependant upon nor governed by Rule 1 of Order XI of the Code of Civil Procedure.

13. The next question to be considered is the contention that specimen signature of the attesting witness cannot be taken u/s 73 of the Evidence Act for the purpose of comparison of the signature in the agreement. Section 73 of the Indian Evidence Act reads as follows:

73. Comparison of signature, writing or seal with others admitted or proved- In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger impressions.

14. The first part of Section 73 of the Indian Evidence Act deals with comparison of admitted or proved signature, writing or seal with the disputed one. The second part of Section 73 enables the court to direct any person present in Court to write any words or figures for the purpose of comparison. In the absence of any admitted or proved signature or writing, the Court may direct the person concerned, who is present in Court, to write any "words or figures". In the first part of Section 73, the expression "signature or writing" occurs. In the second part thereof, the expression "to write any words or figures" occurs. On a purposive interpretation, I am of the view that the expression "to write any words or figures" includes "signature" as well.

15. Section 73 of the Evidence Act contemplates comparison of disputed signature or writing of any person, provided it is relevant for the purpose of the case. That "person" need not necessarily be a party to the suit. The word

"person" is used in Section 73. The Section does not use the expression "party" or "party to the suit or proceeding". The only plausible interpretation that could be had is that a specimen signature or thumb impression of a party to the suit, or a witness or any other person can be taken u/s 73 of the Evidence Act.

16. In *Dinanath Shrivastava v. Sukhdeo Narayan Prasad and others*³, referring to Section 73 of the Evidence Act, it was held thus:

The language is wide in terms and empowers the Court to give necessary direction to any person present in Court and there does not appear to be any reason to limit the expression "any person" to parties to the litigation. If the authenticity of a writing by a stranger is necessary to be decided in a case, such a person must come within the sweep of the section. To interpret it otherwise would be to defeat the object of the section. Even if the meaning of the provision be assumed to be ambiguous, the Court must construe it in a way which may advance the object of the section and the interest of justice.

17. It is made clear that I have not expressed any view as to whether the specimen signature or writing of the attesting witness requires to be taken in the present case, for the following reasons: (1) The attesting witness has not been examined; (2) The Petitioner has not made any application for comparison of the signature of the attesting witness in the agreement with her specimen signature; and (3) Notice was not issued to the Respondent/defendant in this Original Petition.

18. For the aforesaid reasons, I reject the above-mentioned contentions put forward by the Petitioner. Accordingly, the Original Petition is dismissed.

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