

(1994) 11 KL CK 0019
In the High Court Of Kerala
Case No : C.R.P. No. 547 of 1994 C

V.M. Mathew

APPELLANT

Vs

V.S. Saramma and Others

RESPONDENT

Date of Decision : 16-11-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 11, 115, 115(1)
Evidence Act, 1872 — Section 138, 142, 154, 33
Succession Act, 1925 — Section 278
Succession Rules, 1925 — Rule 8 , 9

Citation : (1994) 11 KL CK 0019

Hon'ble Judges : K.G. Balakrishnan, J;K. Narayana Kurup, J

Bench : Division Bench

Advocate : K.N. Narayana Pillai, for the Appellant; P.G.P. Panicker, for Respondents 1 and 2, K.K. Krishna Pillai, for Respondent 7 and S.K. Harish, for Respondents 15 to 18, for the Respondent

Final Decision : Dismissed

Judgement

K.G. Balakrishnan, J.—The Petitioner is the 7th Defendant in O.S. No. 2/1992 on the file of District Court, Ernakulam. The suit was originally filed as O.P. (L.A.) No. 159/1988 for obtaining letters of administration in respect of a Will dated 15th September 1976 allegedly executed by V.S. Annamma. Petitioner and other Defendants in the, suit are contesting the proceedings. There was an earlier proceeding for letters of administration in respect of the same Will but those proceedings were disposed of by holding that the Petitioner therein did not comply with Section 278 of the Indian Succession Act, and Rules 8 and 9 framed thereunder. In that proceedings one witness by name Kurian was examined on the Plaintiff's side. In the present proceedings, the 7th Defendant-the Petitioner herein wanted to use the deposition of the said witness Kurian who had been examined as witness in O.P. (L.A.) No. 159/88. The Plaintiff objected the production of deposition as an item of evidence. The objection was raised on the basis of Section 33 of the Indian Evidence Act. The Plaintiff contended that

witness Kurian was examined as his witness in the earlier proceedings and therefore he had no right or opportunity to cross-examine that witness and hence, his evidence cannot be used in subsequent proceedings. The objection raised by the Plaintiff was sustained and the revision petition is directed against the order passed by the District Judge.

2. We heard the Petitioner's counsel and the counsel for the Respondents. The counsel for the Respondents contended that this C.R.P. is not maintainable u/s 115 of CPC. At first we shall consider the maintainability of this revision. The objection is raised on the ground that by the impugned order the rights of the parties are not adjudicated upon and that if this order is allowed to stand it would not occasion failure of justice or irreparable injury to the Petitioner herein. The Respondents' counsel made reference to two decisions of this Court reported in *Erinhikkal Parammal Ravindran Vs. K. Roja and Others*, and *Mytheen Kunju v. Azees Kunju* 1992 (1) KLT 713. In these two decisions the view taken is that the powers of High Court u/s 115 of the Code could be used only if the order of the subordinate Court constitutes "any question which has been decided", and the proviso to Section 115(1) of the Code introduced by the 1976 Amendment Act restricts the High Court's power of revision created by Section 115(1) of the Code to those cases which fall within Clause (a) and (b) of the proviso. As regards the explanation added it was held that explanation explains the meaning of "any case which has been decided" and it was introduced for the purpose of clearing the doubts as to whether interlocutory orders fall within the expression "any case which has been decided".

3. Two decisions of the Supreme Court are of some relevance on this aspect. One is reported in *Major S.S. Khanna Vs. Brig. F.J. Dillon*, . In this case the Supreme Court held that:

The expression "case" is a word of comprehensive import; it includes civil proceedings other than suits and is not restricted by anything contained in the section to the entirety of the proceedings in a Civil Court.

The Court held that the power given to the High Court u/s 115 is clearly limited to the keeping of Subordinate Courts within the bounds of their jurisdiction and this power is akin to that of a power to issue a writ of certiorari.

4. In another decision reported in *Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others*, the Supreme Court held that:

...expression "Case" is not limited in its import to the entirety of the matter in dispute in an action.... Every order of the court in the course of a suit does not amount to a case decided. A case is said to be decided, if the court adjudicates some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of Section 115. By overruling an objection to a question put to a witness and allowing the question to be put no case is decided.

5. In *Tata Iron and Steel Co. Ltd. Vs. Rajarishi Exports (P) Ltd.*, a decision on the question of serving interrogatories on the parties under Order 11, Rule 11 was held to be an order revisable u/s 115.

6. In *Doshei Dei v. Rama Routa* AIR 1985 Orissa 77 the rejection of Plaintiff's prayer to lead further evidence for proof of document was held to be an order revisable u/s 115 of Code of Civil Procedure.

7. In *Harish Vs. Som Nath and Others*, it was held that, "an order dismissing an application to frame additional issue amounts to "case decided" and application u/s 115 CPC is held to be maintainable".

8. From the various dicta laid down by Supreme Court and other courts it is clear that even before the introduction of explanation to Section 115 "any case which has been decided" include interlocutory orders passed in the course of the suit which affect the substantial rights of the parties. The explanation added to Section 115 removed the ambiguity, if any, that existed in the expression "any case which has been decided". Nevertheless even by the extended meaning it cannot be said that a revision will lie u/s 115 of the Code of Civil Procedure, if it does not decide the right or obligation of the party in controversy. If the subordinate court fails to exercise the jurisdiction vested in it or exercise jurisdiction not vested in it, definitely a revision will lie against that order. If the impugned order is allowed to stand it would occasion failure of justice or irreparable injury to the party against whom it is made and if no appeal lies against such an order, either to the High Court or any other Court subordinate thereto a revision is perfectly maintainable u/s 115 of CPC. It may be noticed that there is no other provision in the Code by which illegal orders could be challenged.

9. In the instant case, the Defendants wanted to adduce evidence. That was rejected by the Court below. The question as to whether the evidence would be admissible or not is definitely an order affecting the rights of the parties. Therefore we hold that revision is maintainable against the impugned order.

10. The next question to be considered is whether the Court below was right in refusing to admit the evidence given by the witness Kurian in the previous judicial proceeding. (For the purpose of discussion we refer the revision Petitioner as Defendant and the Defendant as Plaintiff). Witness Kurian was examined by the Plaintiff in the previous proceeding. The witness being the Plaintiff's witness, Plaintiff had admittedly no right or opportunity to cross-examine the witness. The contention of the Defendant is that the "adverse party" referred to in the proviso to Section 33 is the Defendant in the previous proceedings and not the adverse party against whom the evidence of the witness is being sought to be used in the present proceedings. Section 33 of the Evidence Act is as follows:

Section 33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.-Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the

purpose of proving, in a subsequent judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable.

Provided that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

11. The contention of the Plaintiff's counsel is that the "adverse party" referred to in the proviso is the Plaintiff as the evidence of the witness is now sought to be used against him. The Defendant's counsel on the other hand contends that going by the plain meaning of the words used in the proviso, adverse party in the first proceeding is the Defendant and not the Plaintiff and the Defendant had the opportunity to cross-examine the witness in the first proceeding. Therefore the evidence of the witness could be adduced as an item of evidence u/s 33 of the Evidence Act. Reference was made to various decisions, but except the decision reported in *Poonamchand v. Motilal* AIR 1955 Raj 179 all other decisions are not on the point. In *Brajaballav Ghose and Another Vs. Akhoy Bagdi and Others*, the Court held that, Section 33 has no application merely on the ground that witness did not appear when cited or that he was not examined when present.

12. In AIR 1930 79 (Privy Council) it was held that:

The true reading of Section 33 of the CPC is that the party had the right and opportunity of cross-examining. It was held that mere opportunity to cross-examine is not sufficient. There must also be a right to do so.

13. In *Sundara Rajali v. Gopala Thevan* AIR 1934 Mad 100 it was held that, "the deposition on which there was an opportunity to cross-examine at all is not admissible u/s 33".

14. In *Poonamchand v. Motilal* AIR 1955 Raj 179 the question was elaborately considered. The Court held that:

The second proviso to Section 33 protects the right of the adverse party in the first proceeding and not the right of the person who produces and examines the witness. The object of this proviso seems to protect those parties against whom the previous proceeding might have gone *ex parte*, or those who could have no right or opportunity to cross-examine them for some reasons. It would also protect co-Plaintiffs or co-defendants who may not have the right or opportunity to cross-examine the witness produced from their own side. But the person who himself examines a certain witness should not be permitted in a subsequent proceeding to raise an objection that the statement should not be admitted

because he had no right or opportunity to cross-examine him.

The learned Judges came to the above conclusion by interpreting that the words used in the proviso viz., "adverse party" refer to the party against whom the witness was examined in the first proceeding. In paragraph 18 of the judgment it is observed.

Ordinarily, this would mean that if the witness is produced by a complainant in a previous criminal proceeding or by a Plaintiff in a previous civil proceeding, then the adverse party in the first proceeding would be the accused or the Defendant, as the case may be. If on the other hand, the witness is produced by the accused or the defend-in the first proceeding, then the adverse party would be either the complainant or the Plaintiff, according as it is a criminal or a civil proceeding.

15. We have carefully read the words used in the proviso to Section 33 of the Evidence Act. We are unable to accept the above view held by the learned Judges in Poonamchand v. Motilal AIR 1955 Raj 179. If the above view is accepted the proviso itself was quite unnecessary and it would have been suffice to say that the evidence given by a witness in a judicial proceeding or before any person authorised by law to take, is relevant for the purpose of proving in subsequent judicial proceeding the truth of the fact which it states, between the same parties or their representatives in interest. The proviso clearly states that the evidence of such witness could be adduced in evidence only if the adverse party had the right and opportunity to cross- examine. So the "adverse party" referred to in the proviso is none other than the party against whom the evidence is sought to be adduced.

16. Here the witness was examined on the Plaintiff's side. The Plaintiff had no opportunity to cross-examine that witness. The evidence given by the Plaintiff's witness in the first proceeding is sought to be used against the Plaintiff. As the Plaintiff had no opportunity in the first proceeding, to cross-examine that witness, his testimony cannot be used against the Plaintiff. It is true that this will lead to a situation where the Plaintiff's own witness could not be used against him if the Plaintiff raises an objection. In the same Way, if the witness in the first proceeding was examined on the Defendant's side and the Plaintiff wanted to use that evidence against the Defendant in the subsequent proceeding between the same parties, the Defendant can raise the objection that he had no opportunity to cross-examine that witness and such evidence would be inadmissible u/s 33. If the adverse party referred to in the proviso is taken with reference to the witness examined in the previous proceeding, the effect of proviso itself is rendered otiose and proviso may not have any meaningful application to the section. In every case, if a witness is examined, the opposite party has got a right of cross-examination. For example, if the witness was examined in the first proceeding as a Defendants' witness, Plaintiff had a right of cross-examination and if the witness was examined as a Plaintiff's witness the Defendants had a right and opportunity to cross-examine that witness. Under these circumstances, the evidence of the Plaintiff's witness and Defendant's

witness could be used in the subsequent proceeding u/s 33 without there being any objection on the basis of the proviso to Section 33.

17. Under the scheme of the Evidence Act, the term "adverse party" is referred to as a party against whom the evidence is sought to be used. In Section 142 the words "adverse party" is referred to as a person who could raise objection to leading question when asked in chief examination. In Section 138 dealing with the order of examination of the witness the term "adverse party" is used as the person who can cross-examine the witness. So also in Section 154 the words "adverse party" is referred to as a person who could cross-examine the witness. So it is clear that the term "adverse party" is used in various sections of the Indian Evidence Act to mean the party against whom the evidence is sought to be used. So in this case the evidence of the witness in the first proceeding is sought to be used against the Plaintiff. Therefore the Plaintiff is the adverse party and as he had no right or opportunity to cross-examine that witness his evidence cannot be used u/s 33 of the Evidence Act. It is true that the Plaintiff who had examined the witness on his side is given a right to raise objection against his own witness but the same right is available to the Defendants if the evidence of the Defendants' witness is sought to be used in a subsequent proceeding. We find that emphasis is given more to the right and opportunity of the party to cross-examine the witness. Whether the evidence is adduced on his behalf or not, the same cannot be used against him unless he had the right and opportunity to cross-examine the witness. The importance of cross-examination to bring out the truth or otherwise is accepted as a basic principle. The evidence which is not tested by cross-examination is held to be inadmissible.

18. After careful consideration of the relevant provisions we are of the view that the Court below rightly rejected the evidence of the Plaintiff's witness in the previous proceeding as the Plaintiff had no opportunity to cross-examine that witness.

The C.R.P. is without any merit and it is dismissed.

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