

Jugal Kishor Ratnu Vs. Mrs. Meena Tevary and Ors.

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Court : Delhi

Decided On : Dec-19-2014

Judge : S. P. Garg

Appellant : Jugal Kishor Ratnu

Respondent : Mrs. Meena Tevary and Ors.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON : November 25, 2014 DECIDED ON : December 19, 2014 + CS(OS) 1688/2006 JUGAL KISHOR RATNU Plaintiff Through : Mr.Rajesh Yadav, Advocate with Ms.Ruchira Arora & Mr.Dhananjay Mehlawat, Advocates. versus MRS. MEENA TEVARY & ORS. Defendants Through : Mr.Sanjeev Sindhvani, Sr.Advocate with Ms.Garima Prashad & Mr.Uday Joshi, Advocates. CORAM: HONBLE MR. JUSTICE S.P.GARG S.P.GARG, J.

IA No.2912/2014 (u/S154Evidence Act) 1. The plaintiff has instituted the instant suit for possession, prohibitory permanent injunction and mesne profits against the defendants. Issues were settled by an order dated 16.10.2008. 22.11.2013 before the Local Commissioner, On the plaintiff examined Dr.Rajiv Agarwal (PW-5) who proved photocopy of the medical certificate dated 26.12.2005 (Ex.PW-1/5) issued by him. In the crossexamination, Dr.Rajiv Agarwal was confronted with another certificate/document dated 01.08.2006 issued by him. It was exhibited as Ex.PW-5/D-1. The witness was cross-examined on 22.11.2003 and 21.01.2014. At that

stage, learned counsel for the plaintiff sought to cross-examine Dr.Rajiv Agarwal on document Ex.PW5/D-1 and it was objected to by the defendants counsel. Since the learned Local Commissioner was not competent to do so, necessary permission was asked to be taken from the court.

2. The instant IA has been filed by the plaintiff to seek permission of the court to recall and cross-examine PW-5 (Dr.Rajiv Agarwal) and to put questions to him under Section 154 of the Evidence Act. Contesting it, the defendants have stated that the application is an abuse of the process of the court and deserves to be dismissed. The plaintiff intends to seek permission to cross-examine his own witness PW5 (Dr.Rajiv Agarwal) which is not permissible. Section 154 Evidence Act is not applicable to the present civil proceedings. It can be availed only in criminal proceedings and that too when the prosecution witness turns hostile. In the instant case PW-5 (Dr.Rajiv Agarwal) did not turn hostile. He has proved the medical certificates issued by him without deviation. The document (Ex.PW-5/D-1) already on record was in the knowledge of the plaintiff. The witness has given true account and has admitted issuance of both the medical certificates in the discharge of official duties. PW-5 (Dr.Rajiv Agarwal) cannot be considered or taken a hostile witness.

3. Learned counsel for the plaintiff urged that PW-5 (Dr.Rajiv Agarwal) requires to be recalled to put questions regarding issuance of subsequent medical certificate (Ex.PW-5/D-1). The plaintiff would not get any opportunity to ask questions from him about the circumstances in which document Ex.PW-5/D-1 was issued as the defendants would not summon him in their evidence to prove the said document.

4. Learned Senior counsel for the defendants vehemently urged that Section 154 Evidence Act is not applicable to civil proceedings. The plaintiff was aware about the existence of document Ex.PW-5/D-1. Despite that, he took a chance to summon PW-5 (Dr.Rajiv Agarwal). He did not bother to ask any question about the issuance of certificate Ex.PW-5/D-1. Both the certificates were issued by PW-5 (Dr.Rajiv Agarwal) and have been proved by him. He cannot be recalled by the plaintiff to cross-examine him. Such a procedure is unknown to law. Reliance has been placed on Rabindra Kumar Dey vs.State of Orissa (1976) 4 SCC233 Gura

Singh vs.State of Rajasthan AIR 2001 SC330 S.Murugesan vs. S.Pethaperumal AIR1999 Madras 76 and Sivhamurthy Swamy vs.Agodi Songanno AIR1969 Kant.12.

5. Admitted position is that PW-5 (Dr.Rajiv Agarwal) was summoned by the plaintiff to prove medical certificate dated 26.12.2005 (Ex.PW1/5) issued by him when Mr.Bishan Avtar Tevary S/o late Shri Chander Bhan Tevary r/o House No.B-45 Soami Nagar, New Delhi was alive and admitted in Batra Hospital & Medical Research Centre. Certificate dated 26.12.2005 was issued during his life time and he was declared presently not fit to move out of this hospital. It was further recorded therein that the treatment is absolutely essential and potentially life saving. Since this document was issued by Dr.Rajiv Agarwal, the plaintiff had no option but to summon him to prove it in evidence.

6. It appears that Dr.Rajiv Agarwal issued another certificate/document dated 01.08.2006 after Sh.Bishan Avtar Tevary expired in March 2006. Contents of the documents need reproduction:

BATRA HOSPITAL & MEDICAL RESEARCH CENTRE OF CH AISHI RAM
BATRA PUBLIC CHARITABLE TRUST1 Tughlakabad Institutional Area, Mehrauli
Badarpur Road, New Delhi-110062 Phone :

29958. 47 DEPARTMENT OF CARDIOLOGY August 1, 2006. TO WHOM IT MAY CONCERN This is to certify that Mr.Bishan Avtar Tevary, 84 yrs male, resident of B45,Soami Nagar, New Delhi, was admitted to his hospital on the following dates:

17. 12/05-6/1/06 for 9 days in ICCU221/06-30/1/06 for 3 days in ICCU272/06-4/3/06 for 4 days in MICU with a diagnosis of Diabetes mellitus with diabetic nephropathy, hypertension,past h/o CVA (1986,1995),Coronary angiography done 9 yrs back-?.TVD, Acute coronary syndrome, severe LV dysfunction (EF25), Congestive Heart Failure, B.P.H. with UTI, LRTI-consolidation,b/1 basal, renal dysfunction. He was confined to bed and mostly on oxygen during this period, with unstable mental state at times and therefore unable to execute any documents during this period. sd/ Dr.Rajiv Agarwal Consultant & Interventional Cardiologist

7. This document was relied on by the defendants and put to PW-5 (Dr.Rajiv Agarwal) in cross-examination. PW-5 admitted issuance of document (Ex.PW-5/D-1). He added that he had dictated the contents of the said document to his secretary who typed the same at his instance. He, thereafter, read and signed it.

8. Apparently, the plaintiff did not get any opportunity to put questions to Dr.Rajiv Agarwal as to how and under what circumstances, this certificate (Ex.PW-5/D-1) was issued by him and if so, at whose instance and for what specific purpose. CS(OS) No.1688/2006 Issuance of certificate dated Page 5 of 11 01.08.2006 (Ex.PW-5/D-1) may not be in dispute. However, by crossexamining the witness, the plaintiff intends to ascertain the veracity of this certificate. On comparison of both certificates Ex.PW-1/5 and Ex.PW5/D-1, opinion of the doctor in the later part of document Ex.PW-5/D-1 appears somewhat abnormal. It is to be ascertained as to how the witness was able to opine that due to unstable mental state at times, the deceased was unable to execute any documents during this period. Clarification regarding two different medical certificates issued at different stages are needed and can be given only by PW-5 (Dr.Rajiv Agarwal) in answers put to him in the cross-examination by the plaintiff. PW-5 of his own in the examination-in-chief did not divulge if he had issued any subsequent certificate Ex.PW-5/D-1. Only in the cross- examination, when this document was put to him, he admitted its issuance.

9. Recall of the witness is not to suspect his credibility. Only validity/genuineness of the document Ex.PW-5/D-1 requires to be ascertained. The grant of such permission does not amount to adjudication by the court as to the veracity of the witness. It is for the trial court to come to its own conclusion after the parties adduce their respective evidence finally. Discovery of truth is the essential purpose of any trial or inquiry. Truth of the matter has to be extracted and it may be unravelled at any stage of the case. Recall of PW-5 (Dr.Rajiv Agarwal) would cause no prejudice to the defendants as they would be at liberty to put questions to him after the cross-examination by the plaintiff is over.

10. In P.Sanjeeva Rao vs.State of Andhra Pradesh (2012) 7 SCC56 the Supreme Court observed:

Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.

11. In *Gura Singh vs. State of Rajasthan* AIR 2001 SC330 relied upon by the defendants, the Supreme Court held:

The terms "hostile", "adverse" or "unfavorable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness", "adverse witness", "unfavorable witness", "unwilling witness" are all terms of English Law. The rule of not permitting a party calling the witness to cross-examine is relaxed under the common law by evolving the terms "hostile witness and unfavorable witness". Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and a unfavorable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requires that leading questions cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the court. The court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. Extensively dealing with the terms "hostile, adverse and

unfavorable witnesses" and the object of the provisions of the Evidence Act this Court in *Sat Paul v. Delhi Administration* AIR 1976 SC2941 held: To steer clear of the controversy over the meaning of the terms 'hostile' witness, 'adverse' witness, 'unfavorable' witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared 'adverse' or 'hostile'. Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in Cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in *Baikuntha Nath v. Prasannamoyi* : AIR 1922 PC409 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 the witnesses 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. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as 'declared hostile', 'declared unfavorable', the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts. It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English Law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the court under Section 155. Under the English Act of 1865, a party calling the witness, can cross-examine and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be 'adverse'. As already noticed, no such condition has been laid down in Sections 154 and 155 of

the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is not fettered by or dependent upon the 'hostility' or 'adverseness' of the witness. In this respect, the Indian Evidence Act is in advance of the English Law. The Criminal Law Revision Committee of England in its 11th Report, made recently, has recommended the adoption of a modernised version of Section 3 of the Criminal Procedure Act, 1865, allowing contradiction of both unfavorable and hostile witnesses by other evidence without leave of the court. The Report is, however, still in favour of retention of the prohibition on a party's impeaching his own witness by evidence of bad character.

12. The citation S.Murugesan vs. S.Pethaperumal AIR1999 Madras 76 again relied upon by the defendants also permits the court to recall the witness for cross-examination to get out the truth. It further observed that 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 held that the discretion conferred under Section 154 Evidence Act on the court is unqualified and untrammelled and it has to be exercised sparingly when the facts and circumstances of the case warrant.

13. Needless to say, Section 154 confers a discretionary power on the court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. The discretion is wide in scope and is entirely left to the court to exercise it when the circumstances demand. In the instant case, two medical certificates have emerged/surfaced; one relied upon by the plaintiff when Sh.Bishan Avtar Tevary was alive and the other relied on by the defendants (Ex.PW-5/D-1) issued after his death. To find out the truth as to under what circumstances and on the basis of what medical record the subsequent certificate (Ex.PW5/D-1) was issued and to ascertain its veracity, in my considered view, PW-5 is required to be recalled for crossexamination by the plaintiff under Section 154 Evidence Act.

14. In the light of the above discussion, the IA is allowed. PW-5 (Dr.Rajiv Agarwal) shall be recalled for cross-examination only regarding issuance of document (Ex.PW-5/D-1) After the cross-examination, the Local Commissioner shall give an

opportunity to the defendants to put questions to PW-5 (Dr.Rajiv Agarwal).

15. The IA stands disposed of in the above terms. CS(OS) 1688/2006 16. List before the Court Commissioner on 22nd January, 2015. (S.P.GARG) JUDGE December 19, 2014 sa

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