

Atul Bora Vs. Akan Bora

Atul Bora Vs. Akan Bora

SooperKanoon Citation : sooperkanoon.com/131796

Court : Guwahati

Decided On : Dec-19-2006

Judge : I.A. Ansari, J.

Appellant : Atul Bora

Respondent : Akan Bora

Judgement :

I.A. Ansari, J.

1. By making this miscellaneous application, the election petitioner has sought for necessary permission, under Section 154 of the Evidence Act, to put such question(s) to the witness No. 2 for the election petitioner, namely, the Returning Officer, which might be put to the witness, in cross-examination, by the adverse party, the case of the election petitioner, for seeking, such a permission, being, in brief, thus. In his examination-in-chief, the Returning Officer has deposed that without identity card being displayed, nobody was allowed to enter the place of counting, the engineers did not open the upper portion of the controlling units and that the engineers had opened only the lower portion of the controlling units. In his examination-in-chief, this witness has given evidence to the effect that when the engineers took up examination of the controlling unit of polling station No. 164, he had not made any announcement that the engineer would be opening the controlling unit of polling station No. 164 and that even when the engineers took

up examination of the controlling unit of polling station No. 196, they had not made any announcement in this regard. It is in the evidence of this witness that there was only one camera in the hall, where the said examination took place, and that they had not permitted any other camera inside the counting hall nor had they allowed mobile phones inside the counting halls or at the place of examination of the said controlling units. It is also in the evidence of this witness that even at the time, when the EVMs were examined, no mobile phones were permitted inside the counting hall. Notwithstanding these assertions of this witness, the video recording of the counting process, which is under challenge in the present election petition, shows that (i) mobile phone was used inside the hall, where the counting took place, (ii) more than one camera was used for the purpose of video recording of the counting process and, particularly, of the process of examination and repairing of the EVMs, and (iii) not only that a person, without holding any identity card was allowed to enter into the place of counting, but that such person was also allowed to handle the EVMs and repair the same inasmuch as a person, according to the recorded proceeding, had opened the entire EVM and (iv) contrary to what this witness asserted, announcement had also been made by this witness before the examination of the controlling unit of polling station No. 164 was held by the person aforementioned, but in the case of the controlling unit of polling station No. 196, no such announcement was made. In these circumstances, it is submitted by the election petitioner that the witness is not desirous of telling the truth and, hence, it is necessary to allow the election petitioner to put to the witness such question(s), which might be put to him, in cross-examination, by the adverse party so as to enable the election petitioner to extract truth from the said witness.

2. Opposing the above application made by the election petitioner seeking to invoke this Court's power under Section 154 of the Evidence Act, the respondent has filed an objection, his objection being, in brief, thus. In a proceeding, arising out of an election petition, the election petitioner cannot be, allowed to cross-examine his own witness. The stage for applying the provisions of Section 154 has not yet been reached and that without having, first, resorted to the provisions of Sections 144 and 145 of the Evidence Act, the prayer for cross-examining the witness, under Section 154, cannot be allowed. In a trial of an election petition, the provisions of Section 154 are not attracted inasmuch as the Code of Civil

Procedure, which applies to the election proceedings, does not permit the election petitioner to cross-examine his own witness. The witness, in question, has not exhibited any hostility towards the petitioner and merely because of the fact that the witness is not giving evidence, which the election petitioner expected him to give, the witness cannot be allowed to be cross-examined by taking resort to Section 154.

3. I have heard Mr. N. Dutta, learned Senior counsel, appearing on behalf of the election petitioner, and Mr. A.M. Mazumdar, learned Senior counsel, appearing on behalf of the respondent.

4. Appearing on behalf of the petitioner, Mr. Dutta has submitted that the video tapes clearly reveal that the witness has been suppressing the truth and since he is withholding the truth, this Court may, in the interest of justice, allow the election petitioner to put to the witness all such questions as may be put to him, in the cross-examination, by the adverse party so as to enable extraction of truth from the witness. Resisting the submission so made, Mr. Mazumdar contends that merely because of the fact that the witness has not been giving evidence, which was expected by the election petitioner, the election petitioner cannot be allowed to cross-examine the witness. It is also contended by Mr. Mazumdar that Section 137 and 138 of the Evidence Act give the order in which witnesses are to be examined and, in the case at hand, since cross-examination of the witnesses of the election petitioner has not yet been completed, the question of applying the provisions of Section 154 does not arise. It is further contended by Mr. Mazumdar that merely because of the fact that witness has not been giving evidence favourable to the election petitioner, the election petitioner cannot be allowed to cross-examine his witness, particularly, when the attention of the witness to the video tapes has not been drawn by the election petitioner till this moment in terms of Sections 144 and 145. There is no element of hostility, according to Mr. Mazumdar, shown by the witness to the election petitioner and there may, at best, be some variation between what the witness has deposed and what the video tapes reveal, but such variation cannot be regarded sufficient to invoke the power under Section 154. Support for these submissions is sought to be derived by Mr. Mazumdar from the decisions in *S. Murugesan v. S. Pethaperumal* : AIR1999

Mad76 , Rabindra Kumar Dey v. State of Orissa : 1977 CriLJ173 and Travancore Devaswom Board v. Thanath International, reported in (2004) 13 SCC 44.

5. Repelling the submissions made on behalf of the respondent, Mr. N. Dutta has contended that the exercise of power under Section 154 is not subject to provisions of Sections 137 or 138. It is also contended by Mr. Dutta that it is not necessary that only in the cases, where a Court finds that a witness has turned hostile to the party, which has called the witness, that the power under Section 154 can be exercised. In fact, the power under Section 154, submits Mr. Dutta, can be exercised, when the Court is satisfied that a witness is withholding the truth and his cross-examination is necessary to extract the truth. Drawing attention of this Court to Section 87 of the Representation of Peoples Act, 1951, Mr. Dutta has also submitted that the provisions of the Evidence Act apply to such proceedings and in the facts and circumstances of the present case, the exercise of power, under Section 154, is necessary in the interest of justice.

6. While considering the prayer made by the election petitioner for permission to put to the witness such question(s) as, in terms of Section 154, may be allowed to be put by the adverse party, what needs to be noted is that according to Section 87 of the Representation of Peoples Act, 1951, whereas, in the trial of election petitions, the provisions of the Code of Civil Procedure are to be applied as nearly be possible, the provisions of the Evidence Act are applicable, in their entirety, to the trial of the election petitions. It is, therefore, incorrect to submit that in the proceeding arising out of an election petition, Section 154 cannot be applied.

7. Since it is Section 154, which forms the subject of controversy in the present petition, Section 154 is reproduced hereinbelow:

154. Question by party to his own witness.-- The Court may, in its decision, permit the person, who calls a witness to put any question to him which might be put, in cross-examination, by the adverse party.

8. A careful reading of Section 154 clearly shows that this Section does not specify the stage at which a person, who calls a witness, shall be allowed to put to such a witness such question(s), which might be put to the witness, in cross-examination,

by the adverse party. Section 154, strictly speaking, enables the Court to reach the truth or otherwise of an issue, which may arise during the progress of a trial. Section 154, nowhere, uses the expressions, such as, 'hostile witness', 'adverse witness' or 'unfavourable witness'. What Section 154 says is that a Court may, in its discretion, permit the person, who calls a witness, to put any question to such a witness, which might be put to him in cross-examination, by the adverse party.

9. In view of the fact that Section 154 does not specify the stage at which the provisions of this section can be resorted to and, at the same time, when Section 154 has allowed the Court to use its discretion in the matter, it is clear that it depends on the Court whether or not it allows a witness to be cross-examined as indicated in Section 154. Since no exercise of judicial power can be arbitrary, the discretion, vested in the Courts under Section 154, can also not be arbitrarily exercised. The exercise of this discretion has, over a period of time, come to be settled by various judicial proceedings. There is unanimity in the judicial opinion that, a party will not be allowed to cross-examine his own witness unless the Court is satisfied that (a) the witness exhibits an element of hostility or (b) that the witness has resiled from a material statement already made by him or (c) whether the Court is satisfied that the witness is not speaking the truth and it is necessary to cross-examine him to extract the truth from him.

10. It can, thus, be seen that the cross-examination of a witness by the party, who calls the witness, is not necessarily confined to a situation, where the witness exhibits an element of hostility or where he is shown to have resiled from any statement made in the past. Even in a case, where the Court is satisfied that the witness is not speaking the truth and it is necessary to cross-examine him in order to enable the party, which has called the witness, to bring out the truth from the witness, it becomes the duty of the Court to allow to be put to such a witness all such questions, which might be put to him, in cross-examination, by the adverse party, for denial of such permission would make the entire trial a farce inasmuch as the Court would not come to know as to what the truth of the matter was. However, for exercise of power under Section 154, there must be materials to show that the witness is not stating the truth or that he has turned hostile to the party, which has called, or that the witness has resiled from his previous

statement.

11. True it is, as pointed out by Mr. Mazumdar, that merely because of the fact that a witness speaks the truth, which may not suit the party on whose behalf he is deposing, discretion to allow the party concerned to cross-examine his own witness cannot be exercised. At the same time, one has to also bear in mind that an effective and successful conclusion of trial is not possible and justice will remain elusive if the Court, though, on materials placed before it, is satisfied that the witness is withholding the truth and his cross-examination is necessary to extract the truth, does not permit examination of such a witness by the party, who has called the witness. Since the contingency to extract truth may arise at any stage of a trial. Section 154, consciously drafted, does not speak of the stage, when such a permission can be granted. When the legislature has chosen not to put any fetters on the exercise of powers under Section 154, the Court cannot read, though contended by Mr. Muzumdar, into Section 154 that the power contained therein is subject to the provisions of Sections 137 and 138. It may be made clear that Sections 137 and 138 merely indicate as to who shall be examined in which order and how the examination of a witness shall proceed and be completed. Sections 137 and 138, thus, do not put fetters on the exercise of jurisdiction by the Court, in an appropriate case, under Section 154. However, the exercise of discretion, under Section 154, does not, I may hasten to add, amount to adjudication by the Court as to the veracity of the witness. Since the Court's aim is to reach the truth the power, under Section 154, needs to be liberally exercised if the Court is satisfied that the witness is unwilling to speak the truth or what the witness is speaking is belied by contemporaneous materials on record. When a witness is cross-examined, with the leave of the Court, by the party, who calls him, the evidence of such a witness cannot be treated to have washed off the record altogether and it is for the Court to consider, in each case, whether, as a result of such cross-examination, the witness stands thoroughly discredited or can still be believed with regard to a part of his testimony.

12. The fact that Section 154 states that a Court may permit a person, who calls a witness, to put any question to the witness, which might be put, in cross-examination, by the adverse party is of great significance. There may be

instances, where a witness does not intelligently exhibit any hostile feelings during his examination-in-chief, but reveals the tendency to support the case of the adverse party during the progress of his examination. In such a situation, cross-examination of such a witness by the party, who might have called the witness, may become necessary to extract the truth, even when his cross-examination by the adverse party is over. Considered from this stage, I find considerable force, in the submission of Mr. Dutta, that it is possible, even in re-examination by a party, to cross-examine his own witness if, during the course of cross-examination by the adverse party, the witness can be shown to have been suppressing the truth. Indeed, the fact that such course is permissible in law is indicated by the Apex Court in *Dahyabhai v. State of Gujarat* : 1964 CriLJ472 , wherein it has been held as follows:

Section 137 of the Evidence Act gives only the three stages, in the examination of a witness, namely examination-in-chief, cross-examination and re-examination. This is a routine sequence in the examination of a witness. This has no relevance to the question when a party calling a witness can be permitted to put to him questions under Section 154 of the Evidence Act, that is governed by the provisions of Section 154 of the said Act, which 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. Section 154 does not in terms, or, by necessary implication confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the eye-witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is, to make it ineffective in practice. A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing Court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the Court cannot, during the course of his cross-examination, (sic-re-examination) permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party. To confine the operation of Section 154 of the Evidence Act to a particular stage in the examination of a witness is to read words

in the section which are not there. We cannot also agree with the High Court that if a party calling a witness is permitted to put such questions to the witness after he has been cross-examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers, elicited by putting such questions. In such an event the Court certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The Court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief.

13. Since it has been contended, on behalf of the respondent, that permission under Section 154 can be granted by the Court to a party provided that the provisions of Sections 144 and 145 have been complied with, necessary it is that the provisions contained in Sections 144 and 145 of the Evidence Act be carefully considered. For this purpose, Sections 144 and 145 are reproduced hereinbelow:

144. Evidence as to matters in writing .-- Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents by any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

145. Cross-examination as to previous statements in writing.-- A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

14. A bare reading of Section 144 clearly shows that this section comes into play only when the witness is asked questions, while under cross-examination, with regard to any contract, grant or other disposition of property. In the present case, Section 144 has absolutely no application, for, the witness, who is sought to be cross-examined by the election petitioner, has not been asked any question on any contract, grant or other disposition of property. As regards Section 145, suffice it to point out that a bare reading of Section 145 makes it abundantly clear that this section comes into play only when a witness is under cross-examination. The question of drawing attention of a witness to his previous statement does not arise until the time the cross-examination of the witness commences. Necessarily, therefore, Section 145 cannot proceed Section 154; rather, it is Section 154, which will proceed Section 145. To put it differently, it is only when a party is allowed to cross-examine his own witness, under Section 154, that such a party can cross-examine the witness with regard to previous statement made by the witness, in writing, by drawing, in terms of the provisions of Section 145, attention of the witness to his previous statement made, in writing, or reduced into writing.

15. Bearing in mind what have been indicated above, when I turn to the facts of the present case, what attracts the eyes, most prominently, is that the assertions made by the election petitioner to the effect that what the witness has deposed, in his examination-in-chief, is belied by the recorded proceeding of the videographs, have not been categorically disputed or denied by the respondent. In fact, on the last date of this proceeding, Material Exhibits 2 and 3, (i.e. the video tapes), were run in this Court in the presence of the counsel for both the parties and what transpired there from is contrary to what the witness had deposed inasmuch as mobile phone is shown to have been used inside the counting hall, a person, without bearing any identity card, was not only allowed to enter into the place of counting, but that he was also allowed to, in fact, open the EVM. This apart, notwithstanding the fact that the witness asserted that the engineers had not opened the upper portion of the controlling unit and that only lower portion of the controlling unit was opened, the videotapes show that not only the lower portion, but even upper portion of the EVM was opened and more than one camera was used inside the counting hall. In the face of these glaringly noticeable materials, there is no reason for this Court not to feel satisfied that the witness is unwilling to

speak the truth and that he is withholding the truth. In the facts and circumstances of the present case, this Court is satisfied that in the interest of justice, the election petitioner needs to be given permission to put to the witness any such question, which could have been put to him by the adverse party so as to enable the election petitioner to extract truth from the witness.

16. I may pause here to point out that the case of *Thanath International* (supra) clearly shows that the apex Court's decision is confined to the facts of the case for in the facts of the case, for, the Apex Court found that it was wholly impermissible for the Court to have allowed the party, which had called the witness, to cross-examine him. In the case at hand, the witness is shown to have not been telling truth before this Court. In such circumstances, denial of permission to the election petitioner to cross-examine the witness would be contrary to all sense of justice and fair-play in a trial of election petition.

17. Considering, therefore, the matter in its entirety and in the interest of justice, the prayer made by the petitioner is hereby allowed.

18. With the above observations and directions, both these Misc. Cases shall stand disposed of.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com