

Sofia Khonom Vs. Vijaya Bank

Sofia Khonom Vs. Vijaya Bank

SooperKanoon Citation : sooperkanoon.com/138165

Court : Guwahati

Decided On : Sep-22-2006

Judge : Z. Angami, J.

Appellant : Sofia Khonom

Respondent : Vijaya Bank

Advocate for Def. : Mr. B.N. Sarmah

Advocate for Pet/Ap. : Mr. P.B. Paul

Judgement :

Z. Angami, J.

1. This appeal under Rule 29 of the Rules for Administration of Justice and Police in Nagaland is directed against the judgment and order dated 27.10.05 passed by the Court of ADC(J), Dimapur in Money Suit Case No. 51/95. The appellant before this Court is the plaintiff before the lower Court and the respondent is the defendant. By the above said order dated 27.10.05, the lower Court had directed the plaintiff/appellant to appear for cross-examination.

2. Stating that the plaintiff was already examined in chief and was also cross-examined by the defendant, it is contended by the appellant that the Court below had misconstrued the order and direction dated 04.02.05 passed by this Court in

F.A. No. 8(K) 02 and had erred in law by recalling the plaintiff for cross-examination. Various grounds have been taken in the appeal for assailing the correctness of the order. Although by an interim order dated 18.11.05 it was ordered that the impugned order dated 27.10.05 passed in M.S. No. 51/95 shall not be given effect to, the case record of the lower Court was not called. As agreed to by the counsel for the parties, the appeal was taken up at the admission stage for disposal of the case.

Heard Mr. P.B. Paul, learned Counsel for the appellant as well as Mr. B.N. Sarmah, learned Counsel for the respondent. Learned Counsel for the appellant submits that the order dated 27.10.05 is untenable in law as it is against the provision of Section 138 of the Indian Evidence Act. He submits that this is not an order in the nature of an order that may be rendered in terms of Order 18 Rule 17 of the Code of Civil Procedure (for short, 'the CPC'). He further submits that in any case the Indian Evidence Act, 1872 is in force proprio-vigore in the State, whereas the CPC is only applicable to the State in spirit and as such any order that may be made under Order 18 Rule 17 of the CPC cannot be made to negate the force of Section 138 of the Indian Evidence Act. Having pointed out that the plaintiff was already examined in chief and also cross-examined by the defendant and that the plaintiff did not want to be further examined, the learned Counsel contends that the plaintiff could not have been ordered to be recalled at the instance of the defendant for the purpose of cross-examination of the plaintiff. As a matter of legal proposition as to challenge the legality of the order dated 27.10.05 passed by the Court below, learned Counsel had placed reliance on the decision of Rajasthan High Court as reported in AIR 1999, Rajasthan 108 (Prahlat Das) and the decision of this Court as reported in AIR 1990 (NOC) 78 (Gauhati).

Mr. B.N. Sarmah submits that the order dated 27.10.05 passed by the Court below is sustainable in law and such order was rendered on consideration of the application made by the defendant under Order 18 Rule 17 CPC. He also submits that the Order dated 27.10.05 is not a new order but in continuation of the earlier orders. During the course of hearing the learned Counsel for the respondent has referred to the application filed on behalf of the respondent as in Misc. Petition No. 13/2000. According to him, the issues came to be framed on 16.3.05 and

ultimately by order dated 30.3.05, referring to the direction of this Court, the Court below had recorded that by proceeding afresh from the stage of framing of issues would mean a fresh trial and thereafter, adducing evidence would be to examine the witnesses and further to order that the plaintiff and witness shall be recalled and re-examined as per law. As against the said order dated 30.3.05, the plaintiff/appellant had filed application as in Misc. Petition No. 33/2005 in MS No. 50/05. According to the learned Counsel, the witness can be recalled by the Court suo moto or at the instance of the party to the proceeding and it is within the competence of the Court to recall any witness in terms of Order 18 Rule 17 CPC. In order to support his contention, as a matter of legal proposition, to show that the Court has the power to recall a witness for examination and/or for cross-examination, he has placed reliance on the decisions of different High Courts as reported in (Satinder Singh), AIR 1998 Madras 323 (SSS Durai Pandian), (1993) 2 GLR (NOC) 10 (Numali Kayastha) and AIR 1981 Punjab and Haryana High Court 1957 (Om Prakash).

3. On perusal of the papers placed on record, it may be seen that by judgment and order dated 4.2.05 passed in FA No. 8(K) 02, this Court had remanded the case of the Court of ADC(J), Dimapur for proceeding the trial afresh from the stage of framing the issues. It was further directed that the issues are to be framed by keeping in view the relevant law in that connection and that sufficient opportunities be given to the parties to adduce evidence in support of their respective cases in accordance with the relevant law. The ADC(J), Dimapur was also directed to re-admit the suit under its original number in the register of civil suit. It was further observed that the evidence recorded during the original trial was, subject to all just exceptions, be evidence during the trial after remand. In Misc. Petition No. 13/2000, while it is stated that in the proceedings the examination of the plaintiff's evidence has already been completed, a prayer has been made for recalling the plaintiff's witness for reexamination on the ground that on perusal of the deposition available in the record it is found that no positive steps had been taken by the former counsel to marshal evidence and for the fault of the counsel the petitioner/defendant should not be made to suffer and that recalling of the plaintiff would in no way cause prejudice to the plaintiff. It is not disputed that the issues were framed afresh vide order dated 16.3.05 passed by the Court below. It is also

the position that order dated 30.3.05 was also passed and in fact in the order dated 27.10.05 the petition filed by the plaintiff praying for modification of the Court's order dated 30.3.05 and the effect of that order dated 30.3.05 have also been referred to. The submission of the plaintiff/appellant as regard to the objection raised to the recalling of the plaintiff for cross-examination on the ground of Section 138 of the Indian Evidence Act has also been recorded and the decisions of the High Courts referred to above by the learned Counsel for the appellant have also been referred to in the order dated 27.10.05. While recording the understanding as to the direction of this Court to the extent that the Court shall proceed afresh with the case from the stage of framing the issues as to mean that of adducing evidence afresh after the issues are framed and further taking the view that the defendant had prayed only for cross-examination of the plaintiff, the Court had directed the plaintiff to appear for cross-examination.

4. From the reading of the order dated 27.10.05 it would appear that the Court below had not examined the issue raised by the defendant in terms of Order 18 Rule 17 CPC and the objection taken by the plaintiff and apparently the Court had proceeded to examine the issue of recalling the plaintiff for cross-examination as to be within the scope of the direction of this Court while remanding the case to the lower Court. While remanding the case to the lower Court by order of this Court, it may be understood that this Court had otherwise recorded that the evidence recorded during the trial shall, subject to all just exception, be evidence during the trial after remand. As appearing from the objection made by the plaintiff/appellant as to the recalling of the plaintiff, as also contended by the learned Counsel at this stage of hearing, the plaintiff did not choose to lead further evidence as by way of re-examination. The issue of recalling the plaintiff for cross-examination was raised in Misc. Petition No. 13/2000, which is pre-judgment and order dated 4.2.05 passed in FA No. 8(K)02. This Court did not make any further observation as to whether any of the witness already examined in chief and cross-examined could be recalled for further cross-examination. Therefore, it may not be correct to take an understanding of judgment and order dated 4.2.05 to the extent that this Court has intended to give any liberty to the parties to ask for recalling of witness for cross-examination without having regard to the provisions of the relevant laws applicable to the case.

It cannot be possibly disputed as regard the legal position of Section 138 of the Indian Evidence Act. It is also the position that even if the CPC is applied only in spirit, the spirit of Order 18 Rule 17 can also be applied by the Court. In the instant case, it is not made to appear that the Court below had actually rendered an order in terms of the spirit of Order 18 Rule 17 for the purpose of recalling a witness. The present order is pure and simple as to recall the plaintiff for cross-examination. While the power of the Court to recall a witness in terms of Order 18 Rule 17 CPC suo moto or at the instance of a party to the proceeding, as also held in the decisions referred to in *Om Prakash (Supra)* and *SSS Durai Pandian (Supra)*, cannot be possibly disputed, it is also the legal position that a specific judicial order is required to be rendered as by way of exercising the powers in terms of Order 18 Rule 17 CPC. This Court, as in a case reported in (1993) 2 GLR (NOC) 10, while recognizing the power of the Court to recall any witness under Order 18 Rule 17, has also held that the Court has recognized that under Order 18 Rule 17 CPC the Court has the power to recall any witness and subject to the law of Evidence can also ask such question to the witness as the Court thinks fit. In the present case, the Court has merely ordered that the plaintiff to recall for cross-examination. Except for reasons that the plaintiff wanted to recall the plaintiff's witness for cross-examination, no particular reasons have been recorded for the purpose of exercising the powers under Order 18 Rule 17 CPC. Exercising of such powers may not also be understood as to dilute the force of Section 138 of the Indian Evidence Act. Therefore, it is all the more necessary to give reasons for recalling a witness for cross-examination. In a case as reported in (1995) 5 ALD 237 (AP) it has been held that recalling of a witness for further examination cannot be allowed on the ground that his counsel at the time of cross-examination was not properly briefed. Be that as it may, without making any further comments on the merit of the materials placed before the Court, I am inclined to take the view that the Court has not proceeded to examine the matter in the light of what is provided in Order 18 Rule 17 CPC but merely on the understanding of the direction of this Court, which does not have the effect of limiting or enlarging the powers of the Court that may be exercised under the above said Order 18 Rule 17 CPC. In any view of the matter, it cannot also be the intention of this Court in passing judgment and order dated 4.2.05 as to give liberty to defendant to merely

call the plaintiff for cross-examination per se without having regard to the effect of Order 18 Rule 17 CPC and Section 138 of the Indian Evidence Act.

5. In view of the above discussions, I am inclined to hold that the impugned order dated 27.10.05 is unsustainable in law and therefore, the same is liable to be set aside. Accordingly, it is ordered that order dated 27.10.05 passed by the Court of ADC(J) be set aside. However, it may be observed that setting aside the impugned order dated 27.10.05 shall not be understood as to hold that the Court cannot exercise powers in terms of the spirit of Order 18 Rule 17 CPC even at this stage suo moto or at the instance of either party to the proceeding, in which case the exercise of such power is obviously dependent on the materials available to the Court.

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