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Court : Orissa

Decided On : Aug-21-1996

Reported in : 1996(II)OLR435

Judge : P. Ray, J.

Acts : Evidence Act, 1872 - Sections 138

Appeal No. : Civil Revision No. 56 of 1996

Appellant : Lalit Mohan Guru and ors.

Respondent : Laxminarayan Guru and ors.

Advocate for Def. : S.M. Sinha and S. Dash

Advocate for Pet/Ap. : B. Ray, C. Choudhury, B. Mohanty, A.K. Mohanty, J.N. Hota, S.K. Samal, S. Patnaik, R.K. Biswal, S. Mohanty and D.B. Das

Disposition : Application allowed

Judgement :

P. Ray, J.

1. By order dated March 8, 1995 this Court directed to issue notice on the question of admission. In response to the said notice plaintiff-opp. party No. 1 has appeared through Mr. S. N. Sinha, learned Advocate. In spite of service of notice opp. party

No. 2 has not appeared. This revision is taken up for final disposal at the stage of admission.

2. Present Civil Revision is directed against an order dated January 20, 1996 passed by the Civil Judge, (Senior Division), Sambalpur rejecting an application filed by the present petitioners under Section 138 of the Evidence Act praying for re-examination of defendants' witness No. 7.

3. Plaintiff-opp. party No. 1 filed Title Suit No. 24 of 1990 for partition. The present petitioners, who are defendants 1, 3 and 4 in the suit, are contesting the suit claiming that the suit houses were bequeathed in favour of the petitioners 2 and 3 by Manbodh Guru and Sabitri Guru. One Kunu Seth, one of the attesting witnesses to the disputed wills, was examined as defendants' witness No. 7. In examination-in-chief the said witness stated that he alongwith other witness Prasant was present when Manbodh and Sabitri put their L.T.I, on the wills respectively executed by them and after those L.T. Is were given they put their signatures. The witness also stated in his examination-in-chief that the wills were executed at about 10 a. m. in the house of Manbodh and those were registered at about 5.00 p. m. in presence of the Sub-Registrar in the house of Manbodh. During cross-examination the said witness stated :

'The entire process of scribing and execution of the will was over by 10 to 11 a. m. I alongwith other witness Prasant came from the house of Manbodh Guru while the writing was going on. Again Pradip called me. At 5.00 p. m. I was called. I had not gone to the house of Manbodh prior to 5.00 p.m.'

immediately after said cross-examination the petitioners filed an application under Section 138 of the Evidence Act permitting them to re-examine the said DW 7 for clarification of his statements made during cross-examination. By the impugned order trial Court rejected the said application.

4. Miss. Panda, appearing on behalf of the petitioners has urged that statement of the witness during cross-examination that he and Prasant came from the house of Manbodh 'while the writing was going on' being vague and inconsistent with his statement in the examination-in-chief and also in his earlier statement during

cross-examination that scribing and execution of the wills were over by 10 to 11 a. m., re-examination of the said witness is necessary to get an explanation what the witness meant by the words 'while writing was going on'. She has submitted that re-examination can be permitted to explain the discrepancy between the statements of the said witness in the examination-in-chief and those in cross-examination. Miss. Panda has relied upon the decisions reported in Vol. 40 (1974)CLT Notes 107 at page 79 (Mohammed Ayub v. Municipal Councillors, Cuttack Municipality and Ors.) : 1980 (1) ILR Cutt. page-1 (Collector, Cuttack and Ors. v. bankar Sahu and Ors.) and 1971 (3) SCC 406 (Chanan Singh v. State of Haryana) in support of her submission.

5. Mr. Sinha appearing for the opp. party No. 1 has submitted that if re-examination is permitted to explain discrepancies between examination-in-chief and cross-examination, the whole purpose and effect of cross-examination will be destroyed. He has submitted that his client seeks to show that defendant witness No. 7 was not present when Manbodh and Sabitri put their alleged LT is on the disputed will. He has put reliance on a decision reported in 1990 (I) OLR 208 (Khirod Behera and Ors. v. Kasinath Behera) in support of his submission :

6. In Khirod Behera's case (supra) Justice V. Gopalaswamy has observed :

'In cross-examining a witness the cross-examining lawyer not only tried to build up his case by establishing new facts but also tried to bring out contradictions in the evidence given in chief examination. One of the main objects of cross-examination is to test the vsracitv of the witness and that object would be frustrated if a witness is permitted to get over the effect of prevaricating and contradictory statements made by him in cross-examination, by taking recourse to the device of re-examination.'

Mr. Sinha relies upon the aforesaid observation in opposing the present application.

In Mohammed Ayub's case (supra) P. K. Mohanti, J. observed :

'The object of re-examination is to give an opportunity to the witness to reconcile the discrepancies, if any, between the statements made by him in examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in tri-deposition.'

In the said Mohammed Ayub's case, one witness stated in his examination-in-chief that the suit land was orally gifted to the petitioner in that case and possession was delivered in his presence. But in cross-examination he stated that at the time of gift the petitioner was in America. In view of the said contradictory statements P.K. Mohanti, J. allowed revision application and directed trial Court to give an opportunity to the petitioners therein to recall the said witness for re-examination.

In the case of Collector, Cuttack (supra) S. K. Ray, Chief Justice interpreted the object of Section 133 of the Evidence Act observing :

'The object of this section is to give opportunity to reconcile the discrepancy, if any, between the statement in examination-in-chief end cross-examination or to explain any statement inadvertently rr!3de in cross-examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination.'

Supreme Court in Chanan Singh's case (supra) has observed in psra-16 of the judgment :

'The purpose of re-examination is explaining any part of the cross-examination which is capable of being construed unfavourably to the party for whom he has given evidence in chief.'

In Field's Commentary on Indian Evidence Act (11th Edition) in Vol. V at page-4787 it has been noted :

'The proper object of re-examination is to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination.....'

7. It appears that the said two earlier decisions of this Court and the Supreme Court were not placed before V. Gopalaswamy, J. in view of the said

pronouncement of the Supreme Court and two earlier decisions of this Court observations made in Khirod Behera's case cannot be said to have laid down any general proposition of law.

8. In this case not only there is some discrepancy between the statement made in examination-in-chief and that made in cross-examination, but there is also inconsistency between the statements made in the course of cross-examination. The words 'while writing was going on'' appear to be vague in the context of other statements of the witness. It is also well-settled that a party should not be allowed to take advantage of ambiguous statement or just a slip or a mistake. This Court is of the view that re-examination of DW 7 is necessary for the purpose of explaining what he meant by his statement 'while the writing was going on'. Of course, while permitting re-examination the trial Court will be careful to see that only relevant questions necessary for explaining that particular statement are put. If necessary, the trial Court will also give an opportunity to opp. party No. 1 to further cross-examine the witness on the statements made during re-examination.

9. For the foregoing reasons, the impugned order is set aside. Petitioner's application under Section 138 of the Evidence Act is allowed. The trial Court will permit the petitioners to re-examine D W 7 in accordance with the observation made in this judgment and if necessary, will give opportunity to the plaintiffs to cross-examine the said witness on the statements made during re-examination.

10. Revision application is allowed. No order as to costs.

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