

Johny Vs. James

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Court : Kerala

Decided On : Jun-13-2006

Reported in : 2006(3)KLT368

Judge : R. Basant, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 18, Rule 4 - Order 22, Rule 10

Appeal No. : W.P. (C) No. 21028 of 2005

Appellant : Johny

Respondent : James

Advocate for Def. : S.V. Balakrishna Iyer,; P.B. Krishnan and; Saigi Jacob P

Advocate for Pet/Ap. : V. Giri,; C. Muralikrishnan and; Abraham George Jacob

Disposition : Petition dismissed

Judgement :

R. Basant, J.

1. What is the correct procedure to be followed when a court receives proof (chief) affidavit? When and at what stage is the court to consider the objections raised to the marking of the documents in such affidavit? If there has been a delay in

considering the objections and giving a ruling thereon, does that confer on a party the right to reopen the evidence and further examine/cross-examine a witness? These are the interesting questions that arise for consideration incidentally in this Writ Petition.

2. A reference to the facts first. The petitioner is the plaintiff in a suit for injunction against passing off. Ext.P10 is the plaint. Against an interim order passed in that suit, C M.A.No. 1/01 was filed before this Court and by Ext.P2 judgment the said C MA was disposed of with specific directions to dispose of the suit within a stipulated time frame. Ext.P3 is the written statement filed by the defendant in the suit. The plaintiff and his witness were examined and the plaintiff's evidence was closed. The defendant examined himself as DW. 1. He filed an affidavit of proof (now popularly referred to as the chief affidavit under Order 18 Rule 4 of the C.P.C. Exts.D1 to D79 and M.Os.1 to 44 were shown as marked in such affidavit. The defendant was to be cross-examined.

3. The plaintiff raised an objection that some of the documents and material objects referred to in the chief-affidavit do not deserve admission at all and some of them have to be further proved. He filed Ext.P4 written objections. Those objections were filed even before the cross-examination commenced. Ext P5 objections was filed by the defendant to Ext.P4. The court gave a ruling on the objections as per Ext.P6 order dated 6/7/2005.

4. By then, the defendant was cross-examined by the plaintiff's counsel on 24/5/05, 25/6/05 and 27/6/05. When the court gave the ruling, it was, inter alia, directed that Exts.D5 to D18, D58 and M.O. 37 can be marked and admitted. The plaintiff, in the light of Ext.P6 ruling filed Exts.P7 and P8 applications The crux of the prayers was that the defendant's evidence which had been closed by then after examination of DW 1 may be re-opened and the defendant may be made available for further cross-examination by the plaintiff's counsel. By Exts.P10 and P11 orders passed on Exts.P7 and P8 applications, those applications were dismissed. The petitioner/plaintiff claims to be aggrieved by Exts.P10 and P11 orders.

5. At the fag end of the trial, after the evidence on both sides was closed, Ext.P9 application was filed by the plaintiff to implead a Company as an additional plaintiff. That Company allegedly had acquired the rights of the plaintiff during the pendency of the proceedings and it was, in these circumstances, prayed that by invoking the powers under Order 22 Rule 10 of C.P.C. the said Company may be permitted to come on record as an additional plaintiff. The defendant resisted the said prayer. It was contended that the application was hopelessly belated. It was further urged that the defendant does not accept the assertion that there has been such assignment of rights of the original plaintiff in favour of the additional plaintiff sought to be impleaded. The learned Judge by Ext.P12 order dismissed Ext.P9 application. Exts.P10 to PI 2 are assailed in this Writ Petition.

6 Under the amended Order 18, significant, qualitative and revolutionary changes have been introduced in the trial of cases before the courts. It is not invariably necessary any more to examine all the witnesses in chief examination before court. Affidavits can be accepted in evidence. The amendment has the obvious intention of expediting the trial before courts. The logic and the spirit of the amendment have got to be imbibed by the law fraternity including Judges and lawyers. Otherwise the amendments will remain on paper only and the intended objective will not be achieved. This Court had occasion to consider the manner in which a proof affidavit has to be filed and the procedure which can/ought to be followed in the decision In reported in Palode Ravi v. Mangode Radhakrishnan 2002 (3) KLT 557. In a later decision reported in Safiya v. Mammu 2005 (4) KLT 223 also there was reference to these aspects. It is unnecessary to advert to these aspects any further detail. But certainly the following principles have got to be followed by all courts. I need only reiterate the settled law for guidance:

(i) The chief affidavit must invariably be in the language of the witness. This will help to avoid the embarrassing situation confronted by many courts these days of the witness/deponent in cross-examination feigning ignorance of what is stated in chief-examination in an alien language,

(ii) While preparing the chief affidavit, counsel have got a duty as officers of court to ensure that only legally admissible materials - oral or documentary, are

introduced. This certainly is the obligation of the Bar to make the amendments effective and be of use in the cause of expediting trial.

(iii) Before commencement of cross-examination, the chief affidavit must be read in court and the affirmation of the deponent obtained - again to avoid any controversy.

(iv) While the chief affidavit is so read, the court must rule on the objections, if any, raised by the adversary. It must be ruled whether objections are sustainable and whether a document/piece of oral evidence is admitted, not admitted or admitted subject to objections. In the light of the decision reported in *Bipin Shantilal Panchal v. State of Gujarat* AIR 2001 SC 1158 : 2001 (1) KLT (SC) (SN) 106P.86 we are to give up what is referred to as 'archaic procedure' of rendering rulings on admission at the time when the documents are sought to be marked. It is possible now to admit a document tentatively reserving ruling on admissibility to a later stage. In the light of the decision of the Supreme Court in *Bipin Shantilal Panchal v. State of Gujarat* AIR 2001 SC 1158 : 2001 (1) KLT (SC)(SN) 106 P.86, there can be no doubt on that aspect any more.

(v) The cross-examination is to commence only after the rulings are so given on the objections and the documents that are marked are categorized as admitted, not admitted or admitted subject to objection.

(vi) Even when a ruling is given that any particular exhibit is not admitted, it will be inexpedient to attempt renumbering of all the documents in fresh sequential order. In that case the ruling need only say that the particular exhibit is inadmissible and shall be excluded from evidence. Appendix need only show that the said exhibit is 'not admitted vide ruling dated....'. After that ruling, no reference shall be permitted to that document. It must be deemed to have been not introduced into evidence at all. This I say because I find some courts dissipating their time and energies to renumber documents afresh after such exclusion.

7. I am unable to understand the decision of the Supreme Court in *Bipin Shantilal Panchal* as absolving the trial Judge of the obligation in all cases to render a ruling on the question of admissibility. Uncertainty ought to be avoided in for the

contestants. If a document is on the face of it and clearly admissible or inadmissible, the court need not and should not hesitate to straightaway give a ruling on that aspect. Only when the dispute about admissibility raised by a contestant poses problems warranting detailed arguments and decision, need the court postpone the decision on such objections. A ritualistic and myopic understanding of the dictum would leave the courts with all sorts of unnecessary, inadmissible materials vexatiously introduced into evidence. Taking advantage of the ruling white paper or unattested xerox copies which are not admissible at all may be stealthily introduced into evidence making it difficult later on to separate the admissible from the inadmissible and leaving it uncertain to the parties as to what evidence has really come in and what has not come in. I say so only to clarify that the observations in paras-12 and 13 of *Bipin Shantilal Panchal v. State of Gujarat* (supra) should not be understood to mean that no ruling need or can ever be given hereafter on the objections raised as and when they are raised. It cannot; be lost sight of that the Supreme Court's observations are intended to expedite trial and to avoid the possibility of remand. That is no licence to a party to introduce into evidence all inadmissible material in the hope that till ruling is given ultimately the records can be permitted to swell and the issue confused.

8. When the court receives documents and assigns numbers to them, it must clearly be assumed that the documents have been admitted or at least admitted subject to objections which are raised. Under Order 13 of the CPC and the relevant rules under the Civil Rules of Practice after admission certain formalities relating to endorsement on the document etc., are to be performed. As soon as the court assigns a number and records the same in the deposition, it must be held that the document has been admitted and the mere fact that the subsequent procedural requirements like affixing the seal/ endorsement has not been performed cannot lead the court to a conclusion that the document has not been admitted. Endorsement and affixing of seals as mandated by Order 13 and the rules are only a post admission formality and the fact that that formality has not been performed, when the deposition shows that the document has been admitted, is of no consequence or avail.

9. Having thus attempted to summarise, the principles and procedure to be followed, I now proceed to consider the contentions raised by the learned Counsel for the petitioner against Exts.P10 and P11 orders.

10. The learned Counsel for the petitioner contends that the petitioner was left in the dark - not knowing whether Exts.D15 to D18, D58 and M.O.37 have been admitted or not. Inasmuch as the formalities under Order 13 (affixing of the endorsement) had not been completed, the petitioner was always in the dark as to whether this document has already come into the records or not. Therefore, the petitioner had not cross-examined D.W.1 with reference to Exts.D15 to D18, D58 and M.O.37. Therefore, the prayer of the petitioner to re-open the evidence of the defendant and an opportunity for further cross-examination are sustainable and justified, it is urged.

11. I am unable to accept this contention at all. First of all, the petitioner was permitted/directed to cross-examine the defendant and on 24/6, 25/6 and 27/6/05 the petitioner had actually cross-examined the defendant. At that stage, the chief affidavit was there. In the chief affidavit. Exts.D5 to D18 and D58 and M.O.37 had already been marked. Of course, it is said that the endorsement, as required under Order 13, had not been made. But the omission/failure to affix the seal with endorsement on the document cannot in any way militate against the admission of those document by the court. As soon as the court permitted or called upon the plaintiff to cross-examine the defendant on the plaintiffs chief affidavit, it must be assumed that the document had at least been tentatively admitted. A plea that the plaintiff did not cross-examine D.W1, awaiting the ruling on the objections raised cannot be accepted. The decision in Bipin Shantilal Panchal v. State of Gujarat AIR 2001 SC 1158 = 2001 (1) KLT (SC)(SN) 106 P86 does not bar the court from giving a ruling at any point of time prior to the final disposal. Therefore, what has happened in this case is that the chief affidavit and the documents referred to in it were received and the petitioner was directed to cross-examine. The petitioner could not have thought that these documents have not come into evidence. He must have, at least, assumed that the documents were marked subject to objections. In this view of the matter, the grievance of the petitioner that he should be given a further opportunity to cross-examine D.W.1 after re-opening the

evidence does not appear to me to be sustainable.

12. The learned Counsel for the defendant further points out that this is an objection without any substance and, at any rate, the jurisdiction of this Court under Article 227 of the Constitution cannot and need not be invoked in favour of the petitioner. The learned Counsel for the defendant/respondent has taken pains to take me through the cross-examination of D.W. 1 to impress upon the court that it is not at all a case where the defendant refrained from adverting to the relevance of these documents and material objects, Exts.D15 to D18, D58 and M.O.37 in the course of cross-examination. I do find merit in that submission. I take note that it was not a case where the petitioner refrained from cross-examining D.W.I on the aspects which were sought to be established by Exts.D15 to D18, D58 and M.O.37.

13. The arguments of the learned Counsel for the petitioner that the documents have not been referred to in cross-examination, but only the oral evidence (sans the documents) in chief-examination was referred to is ingenious; but cannot obviously be accepted. An artificial distinction between the document and oral evidence on that aspect cannot and need not be drawn. In that view of the matter also, the challenge raised against Exts.P10 and P11 cannot succeed,

14. What remains is only the challenge against Ext.P12 order. The learned Counsel for the petitioner submits that the petitioner does not want to adduce any farther evidence on that application and will not claim any opportunity to adduce further evidence, if Ext.P9 application were allowed. The learned Counsel for the respondent/ defendant on the contrary asserts that even if the petitioner does not have any evidence to be adduced, the defendant wants to adduce evidence. The defendant has a contention, and the plaintiff has been notified of that contention in the course of cross-examination of the plaintiff; that the proposed additional plaintiff has not acquired any right from the existing plaintiff in respect of the subject matter of the suit. Allowing the prayer in Ext.P9 would necessarily retard the progress of the suit as the defendant will be constrained to claim an opportunity to adduce further evidence on that aspect, submits the learned Counsel for the respondent/defendant.

15. The fact that in Ext.P9 only Order 1 Rule 10 was referred to and Order 22 Rule 10 was not referred to cannot make any difference as the court is at liberty to invoke the powers under Order 22 Rule 10 even in the absence of specific reference to the same in Ext.P9. The right of the assignee to seek to continue the suit is not absolute and it is for the court to consider whether leave is to be granted or not. It is for the court to grant leave or refuse it depending upon, the facts and circumstances of each case. This proposition has been clearly held by a Division Bench of this Court in *Cherukutty v. Velappu* 1987 (1) KLT 565-Para-6.

16. The jurisdiction that is sought to be invoked is the one under Article 227 of the Constitution *Surya Dev Rai v. Ram Chander Rai* (2003 (3) KIT 490 (SC) narrates the circumstances under which such powers can be invoked notwithstanding the bar against a revision under the amended Code, There can be no contention that the court has no jurisdiction to reject Ext.P9. Does justice fail or prejudice of an exceptional variety result by dismissal of Ext.P9 by Ext.P12 order? This is the only question to be considered.

17. The original plaintiff is a proprietary concern. It is the contention of the plaintiff that during the pendency of the proceedings, the rights of the proprietary concern were transferred to a private limited company incorporated in the interregnum. The plaintiff has no contention that the plaintiff is not competent to or cannot secure the interests of the assignee -the private limited company. The private limited company -the proposed plaintiff has no contention that the interests of the private limited company in the subject matter of the suit will not be properly prosecuted or secured by the original plaintiff. It will be apposite in this context to refer to the following observations of the Division Bench in *Cherukutty v. Velappu* 1987 (1) KIT 565:

It is not absolutely necessary for the assignee to have his name brought on record in the place of the plaintiff, if he is satisfied that his rights will be sufficiently protected by the assignor - plaintiff. O. XXII Rule 10(1) is not mandatory that the assignee should substitute himself in the place of the assignor. If the assignee has confidence in the assignor he may remain in the background and allow the assignor to continue in the proceedings.

In this Writ Petition the court is not to consider whether the ideal course has been followed by the trial court. May be sitting as the first court, this Court would have allowed Ext.P9. But the quality of consideration in a petition under Article 227 of the Constitution cannot be lost sight of. The rejection of Ext.P9 application by Ext.P12 cannot in the facts and circumstances of this case be held to result in any prejudice which requires correction by invoking the extraordinary jurisdiction under Article 227 of the Constitution.

18. No other contentions are raised. I am satisfied, in these circumstances, that the challenge against Exts.P10 to P12 orders cannot succeed and they do not deserve or warrant interference by invocation of the jurisdiction under Article 227 of the Constitution.

19. This Writ Petition is, in these circumstances, dismissed.

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