

Safiya Vs. Mammu

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Court : Kerala

Decided On : Jul-25-2005

Reported in : I(2006)DMC336; 2005(4)KLT223

Judge : K.T. Sankaran, J.

Acts : Code of Civil Procedure (CPC) (Amendment) Act, 1999 - Order 18, Rule 19 - Order 26, Rule 4A; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 18, Rule 4 - Order 26, Rule 4, 16, 16A, 17, and 18; ;Code of Civil Procedure (CPC) (Amendment) Act, 2002

Appeal No. : R.S.A. No. 1217 of 2004

Appellant : Safiya

Respondent : Mammu

Advocate for Def. : V. Ramkumar Nambiar, Adv.

Advocate for Pet/Ap. : O.V. Maniprasad, Adv.

Disposition : Appeal allowed

Judgement :

K.T. Sankaran, J.

1. A hypertechnical approach made by the trial court has resulted in the delay in disposal of the suit of 2001 till 2005. The suit was filed by the respondent, who is the husband of the appellant, for a mandatory injunction directing the appellant/defendant to vacate the plaint schedule house. The respondent contended that the appellant was married by him, but he pronounced 'talak'. Therefore, according to him, the appellant has no right to continue her residence in the plaint schedule house and that she is liable to vacate the house. The appellant/defendant disputed the 'talak' and contended that she is the wife of the respondent/plaintiff and, therefore, she has every right to reside in the plaint schedule house. The appellant also raised other contentions, which are not relevant at present.

2. Before the trial court, the case was posted for the evidence of the appellant/defendant on 20.1.2003. It would appear that the practice being followed by that court is that the proof affidavit under Rule 4 of Order XVIII of the Code of Civil Procedure should be filed at least three days before the date fixed for examination of the party or witness. The appellant having filed the proof affidavit only on 20.1.2003, the date fixed for the evidence of the defendant, the trial court rejected the proof affidavit and closed the evidence. The suit was decreed. The defendant filed appeal before the lower appellate court challenging the judgment and decree of the trial court. The lower appellate court held that the Code of Civil Procedure does not specify when the proof affidavit should be presented before the trial court and that it is left to the discretion of the court conducting the trial. It was also held by the appellate court that the trial court 'cannot insist as a rule' that the affidavit be filed as directed by it. However, the lower appellate court considered the evidence already on record and without having an opportunity to consider the evidence of the defendant, held that the plaint claim is established and confirmed the decree passed by the trial court.

3. The following substantial questions of law have been raised by this Court:

'1. Whether in the facts and circumstances of the case the lower appellate court is justified in holding that there is no denial of justice to the defendant when opportunity was denied to her to adduce evidence?

2. Whether the court can insist as a rule that the affidavit contemplated under Order 18 Rule 4 has to be filed a couple of days prior to the actual examination of the parties when no such condition is contained under Order 18 Rule 4?

3. Whether in the facts and circumstances of the case the courts below are justified in granting a decree of mandatory injunction for evicting the defendant from the plaint schedule property?'

For the purpose of disposal of the Regular Second Appeal, substantial questions of law Nos. 1 and 2 alone need be considered.

4. The counsel for the respondent submitted that the Second Appeal need not be kept pending for long and that the prayer of the appellant that she be given an opportunity to adduce evidence can be granted and time can thus be saved. On the basis of this submission, the Regular Second Appeal is liable to be allowed setting aside the judgment and decree passed by the courts below. Accordingly, the judgment and decree of the courts below are set aside. The trial court shall dispose of the suit afresh after affording an opportunity to the appellant/defendant to file proof affidavit and to adduce such other evidence as she may wish. However, on the questions of law involved in the Second Appeal, it would be apposite to express my view.

5. Rule 4 of Order XVIII of the Code of Civil Procedure reads thus:

'4. Recording of evidence: (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the court may, while appointing a commission under this sub-rule consider taking into account such relevant factors as it thinks fit;(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanor of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commissions under this rule'.

Rule 19 of Order XVIII and Rule 4-A of Order XXVI, which were inserted by C.P.C. Amendment Act 46 of 1999 are also relevant.

Rule 19 of Order XVIII:

'19. Power to get statements recorded on commission: Notwithstanding anything contained in these rules, the Court may, instead of examining witnesses in open

Court, direct their statements to be recorded on commission under Rule 4A of Order XXVI'.

Rule 4-A of Order XXVI:

4-A. Commission for examination of any person resident within the local limits of the jurisdiction of the Court: Notwithstanding anything contained in these rules, any Court may, in the interest of justice or for the expeditious disposal of the case or for any other reason, issue commission in any suit for the examination, on interrogatories or otherwise, of any person resident within the local limits of its jurisdiction, and the evidence so recorded shall be read in evidence.'

6. The Code of Civil Procedure was amended by the Code of Civil Procedure (Amendment) Act, 1999 and Code of Civil Procedure (Amendment) Act, 2002. The purpose of the amendment is for speedy disposal of the cases. The provisions of Order XXVI of the Code of Civil Procedure as they stood before the amendment insisted that the parties and their witnesses shall be examined in open court unless the conditions provided in the Rules are satisfied in which cases alone the party or witness could be examined on commission. But, after the amendment of the Code of Civil Procedure, examination of parties and witnesses in Court has become an exception and their examination by issuing commission has become the rule. Necessarily, proof affidavits of the parties have to be filed under Rule 4 of Order XVIII of the Code of Civil Procedure. The cross examination of the witnesses takes place on the basis of the proof affidavit. The proof affidavit is in lieu of examination in chief. In appropriate cases the Court may take evidence of a party or witness in open court. It is just and proper to grant a breathing time to the opposite party to go through the proof affidavit and get ready for the cross examination of the party or witness concerned. For that purpose, there is nothing wrong in following a uniform practice of insisting the filing of the proof affidavit within a stipulated time before the examination of the party or witness. The Rules do not provide for any period within which the proof affidavit should be filed. In the absence of a specific provision in the Rule, it is in the realm of the discretion of the Court. The discretion is to be exercised not arbitrarily or capriciously. In a given case, a litigant may not be able to produce proof affidavit well before the date fixed

for examination. That need not be a ground for rejecting his case on merits. After all, filing of the proof affidavit is a prelude to the examination of that witness in cross examination. Had the amendment been not there, the examination in chief of the party would be taken in open court and on that day itself the cross examination also would be insisted. So the view taken by the trial court that since the proof affidavit was not filed before three days it is liable to be rejected, is hypertechnical, which has resulted in miscarriage of justice. The trial court should have granted a day's adjournment if the opposite party wanted time on the ground that the proof affidavit was not filed earlier. Had the plaintiff been ready to go on with the trial, then an adjournment would not have been necessary. But rejecting the proof affidavit only on the ground that it was not filed before three days as per the practice followed by the trial court, was not proper. In appropriate cases, the court will be justified in awarding costs to the opposite party, as a condition for accepting the proof affidavit filed belatedly. The intent and purpose of the amendment was not taken note of by the Trial Court while mechanically rejecting the proof affidavit. By disallowing the proof affidavit of the defendant nobody has gained. On the other hand, both parties have been put to much prejudice by the protracted litigation and the final disposal of the Second Appeal only on the short ground that no opportunity was afforded to the defendant to adduce evidence. The Subordinate Courts should take a pragmatic approach in this matter and afford reasonable and meaningful opportunity to the parties to file proof affidavit. At the same time, the litigants and counsel appearing for them also owe a duty to the Court to co-operate with the Court for the smooth trial and disposal of the case, by filing the proof affidavit and other particulars well within time.

The Regular Second Appeal is allowed as above. Parties shall appear before the trial court on 23.9.2005. The trial court shall dispose of the suit within a period of six months.