

Bakhtawar Khan Vs. Noor Mohamad

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Court : Rajasthan

Decided On : Jan-28-1986

Reported in : AIR1986Raj167; 1986(1)WLN138

Judge : K.S. Lodha, J.

Acts : Code of Civil Procedure (CPC) , 1908 Sections 115 - Order 26, Rule 1

Appeal No. : Civil Revn. Petn. Nos. 7 and 27 of 1986

Appellant : Bakhtawar Khan

Respondent : Noor Mohamad

Advocate for Def. : A.L. Chopra, Adv.

Advocate for Pet/Ap. : R.M. Bhansali, Adv.

Judgement :

ORDER

K.S. Lodha, J.

1. These are two revisions filed by the defendant Bakhtawar Khan against the two orders of the learned Addl. Munsif Magistrate No. 1, Jodhpur, dated 19-10-1985 and 14-12-1985 respectively in the same suit and as the matters, involved in these two revisions are connected, they are being disposed of by a common order.

2. The plaintiffs suit for ejection against the present petitioner was pending for the defendant's evidence on 19-10-1985. The plaintiffs evidence had already been over on 24-1-1985. It appears that the defendant had not filed any list of witnesses and, therefore, he was not entitled to get any witness summoned by the Court. One of the witnesses whom the defendant wanted to examine was Shri Narsinghdass Moondra but he was not present in Court on 19-10-1985 and an application, under Order XXVI Rule 1, C.P.C. was filed supported by the affidavit of the learned counsel for the defendant that the witness Shri Narsinghdass had suffered a fracture in his thigh and was unable to come to the Court and, therefore, a Commission may be issued to examine him. This application was opposed by the plaintiff and the plaintiff had filed an affidavit to the effect that the witness had suffered a fracture about 1 1/2 months back. He further averred that merely because the witness was about 73 years old and had suffered a fracture in his thigh he cannot be deemed to be unable to attend the Court and that he could be brought in a taxi or some other conveyance. The Court relying on this averment of the plaintiff and also on the fact that the medical certificate had not been produced, dismissed the application for examining the said witness on Commission. It, however, granted an opportunity to the defendant to produce his evidence by keeping the witness ready in Court on 16-11-1985. On 16-11-1985, the learned Munsif was on leave and, therefore, the case was adjourned to 14-12-1985.

3. On 14-12-1985, the defendant examined himself but his witness was not present and, he urged that the as

Shri Narsinghdass couldnot be produced, he may be allowed to examine one Shri Ajeet Johar, Advocate in his place in order to prove his attestation on the sale deed executed by Narsinghdass in favour of the defendant. This prayer was also disallowed by the Court by its order dated 14-12-1985 on the ground that Shri Ajeet Johar was not present in the Court and no cause was shown why he was not present. Aggrieved of these orders the defendant has come up in revisions.

4. The revision No. 7/86 has been filed against the order dated 19-10-1985, by which his application for issuance of Commission for examining Shri Narsinghdass was refused and revision No. 27/86 has been filed against the order dated 14-12-1985 closing his evidence and refusing to examine Shri Ajeet Johar.

5. I have heard the learned counsel for the parties.

6. It is contended by the learned counsel for the petitioner that the defence of the present petitioner in the suit for ejectment was that he had himself purchased the equity of redemption from Narsinghdass with whom the suit house had been mortgaged by the plaintiff and thus he himself had become the owner of the house and did not continue to be a tenant of the plaintiff. It was on this account that Narsinghdass was sought to be produced in evidence but he could not be produced on account of his fractured thigh and in the alternative when the Court had refused to examine him on Commission, the defendant wanted to produce Shri Ajeet Johar the attesting witness of the sale deed but as the principal witness was Shri Narsinghdass and the defendant was trying to produce him or to get him examine on Commission, Ajeet Johar could not be produced on earlier occasions and without the permission of the Court he could not have produced him on 14-12-1985. It is further urged that the case was called at about 4.30 p.m. on 14-12-1985, by which time Shri Ajeet Johar, who is an advocate was not available and, therefore, also he could not be produced. In these circumstances it is urged by the learned counsel for the petitioner that the orders of the Court below may be set aside and he may be granted an opportunity to produce at least one of these two witnesses. He has further urged that Shri Narsinghdass is still confined to bed and is unable to come to the Court but he would be satisfied if Shri Ajeet Johar is allowed to be produced as a witness in the Court.

7. The learned counsel for the non-petitioner plaintiff, on the other hand vehemently opposed the prayer and urged that as the defendant had failed to file the list of witnesses under O/XVI, Rule 1, CP.C he was not entitled to summon any witnesses and he was given opportunities to produce the witnesses by himself, as he failed to avail of these opportunities and, therefore, he is not entitled to any further indulgence. It was also contended that since the witness Narsinghdass could not have been summoned, a prayer for examining him on Commission also could not have been allowed. It was also contended further that in matters of refusal to examine a witness by the Court no revision can be entertained and reliance was placed upon an authority of a learned single Judge reported in *Ramchand v. Laxmikumar*, AIR 1980 Raj 128.

8. I have given my careful consideration, to the rival contentions. It may be stated at the very outset that the fact that the witness Narsinghdass is 73 years old and had suffered a fracture in his thigh had not been disputed before the Court below. What was contended by the plaintiff in his affidavit was that merely because the witness is 73 years old and has a fracture of his thigh it cannot be assumed that he is unable to come to the Court because he can be brought in taxi or some other conveyance. I am unable to accept this logic. When a learned counsel representing the defendants had on the basis of his personal knowledge filed an affidavit that the witness was unable to move about and come to the Court, there was no justification for the learned Munsif to hold on the surmises made by the plaintiff in his affidavit that the witness could not be said to be immobile. Further he also cannot be said to be justified in rejecting the affidavit of the learned Advocate merely on the ground that no medical certificate had been produced. As already stated above when the fact of the fracture itself was not in dispute the absence of the medical certificate was no ground to discard the affidavit of Shri Bhansali, learned counsel for the defendants. Therefore, it is absolutely clear that the learned Munsif was entirely wrong in rejecting the application for examining Shri Narsinghdass on commission on the grounds stated by him.

9. The question, however, is, as has been sought to be raised by the learned counsel for the plaintiff non-petitioner, whether in the absence of the list of witnesses the defendants could have asked for commission for examining one of his witnesses. The argument is that since no list had been filed under Order XVI, Rule 1, C.P.C., the defendant was not entitled to get his witness summoned and, therefore, he could not have asked for a commission for examining that witness. In my opinion the contention is wholly misconceived. Getting the witness summoned is quite different from getting the witness examined on commission. If the list of witnesses has not been filed as required by Order XVI, Rule 1, C.P.C, the party can be deprived of the opportunity for summoning the witnesses but if the witness is present in Court the Court cannot refuse to examine such a witness. Rule 16(1)(a), C.P.C., clearly provides that subject to the provisions of Sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents and it is why that despite the absence of the list of witnesses and despite his refusal to issue commission for examining Shri Narsinghdass, the Court by its order dated 19-10-1985 granted an opportunity to the defendant to produce his own witnesses. That being so, when the witness can be kept present and the Court would then examine such a witness despite the absence of the list of witnesses the further question which arises is that if such a witness who appears to be a material one could have been kept present in Court, cannot be so brought before the Court on account of his physical inability, should the Court refuse to issue a commission for examining him merely because the list of witnesses had not been filed and my answer to this is clearly in the negative. The purpose of issuing a commission is quite different from the purpose of summoning a witness. Order XXVI, Rule 1, C.P.C., gives power to the Court to issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it. The inability to attend the Court in such a circumstance is not on account of the absence of the list of witnesses but because of the incapacity or inability of the witness himself and it is for this reason that instead of the witness being brought to the Court, the Court manages the recording of his evidence outside the Court so that the incapacitated witness is not put to any inconvenience and the party also does not suffer for not being able to examine such a witness. In these circumstances it cannot be conceived that a commission cannot be issued for examining a witness under Order XXVI, Rule 1, C.P.C., merely because the list of witnesses has not been filed by the party concerned. In these circumstances, I am clearly of the opinion that the learned Magistrate was entirely wrong in refusing to issue a commission for the examination of Shri Narsinghdass and he acted illegally or at least with the material irregularity in exercise of his jurisdiction in dismissing the application for issuing commission.

10. This brings me to the other revision against the order dated 14-12-1985 as in pursuance of the order dated 19-10-1985, the defendant could not produce Shri Narsinghdass as according to him Narsinghdass was still confined to bed, he prayed that he may be allowed to examine another witness Shri Ajeet Johar an advocate, who was an attesting witness to the sale deed said to have been executed by Shri Narsinghdass in favour of the defendant and this prayer was also refused because Shri Ajeet Johar was not present in Court. As the order stands no exception can be taken to it because Ajeet Johar was not present in Court and, therefore, the Court was not bound to either adjourn the case or to summon this witness but what the learned counsel for the defendant urges is that all that he wanted was to prove the sale deed and for that he either wanted that his witness Narsinghdass may be examined on commission and if that was not possible Shri Ajeet Johar may be examined in his place but since Ajeet Johar was not present in Court he prayed for an adjournment and that was refused. Now he wants that he may be allowed one opportunity either to produce Shri Ajeet Johar or to examine Shri Narsinghdass on commission. I have already stated above that the order refusing to issue a commission for examining Shri Narsinghdass cannot be sustained and if a commission is directed to be issued for examining Shri Narsinghdass, the defendant need not examine Ajeet Johar, Advocate.

11. I cannot agree with the learned counsel for the non-petitioner that in matters like this, the revision does not lie under Section 115 C.P.C. and in my opinion that authority relied upon by him does not apply to the facts and circumstances of this case. In Ramchand's case (AIR 1980 Raj 128) (supra) the position was that after

the defendant's evidence had already been closed the defendant wanted to produce one more witness and he applied orally in that respect and the prayer was rejected. It was against that order that the revision was filed before the Court and the Court was of the opinion that such a revision cannot be maintained as the defendant did not produce the evidence at the appropriate time when full opportunity was given and wanted to examine the witness at the last hour. It was further observed that there was absolutely absence of proof of failure of justice or irreparable injury in such a case. This is not the position in the present case. The defendant's evidence was opened at the time the commission was applied for. There was valid reason for the defendant for asking for a commission and the refusal of such a prayer would certainly have amounted to irreparable injury to the defendant because he could have failed to establish the sale of the mortgaged property by Narsinghdass in his favour.

12. For the reasons stated above the revision No. 7/86 is allowed and the order of the learned Munsif is set aside and it is directed that a commission shall be issued for examining Narsinghdass. The revision No. 27/86 is also partly allowed and the order closing the defendant's evidence is set aside.

13. The parties shall appear before the trial Court on 18-2-1986. On the said date the Court shall appoint a Commissioner and thereafter it will proceed in accordance with law.

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