

Vasanthi and ors. Vs. Silambana Gounder (Died) S/O Appichi Gounder and N.S. Palanisamy S/O Silambana Gounder

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Court : Chennai

Decided On : Jul-16-2009

Reported in : (2009)6MLJ841

Judge : K.K. Sasidharan, J.

Acts : Evidence Act - Sections 17, 21, 33 and 145

Appeal No. : C.R.P.(PD). No. 136 of 2009 and M.P. No. 1 of 2009

Appellant : Vasanthi and ors.

Respondent : Silambana Gounder (Died) S/O Appichi Gounder and N.S. Palanisamy S/O Silambana Gounder

Advocate for Def. : A. Sundaravadanam, Adv. for V. Bharathidasan, Adv.

Advocate for Pet/Ap. : V. Ayyadurai, Adv.

Disposition : Petition allowed

Judgement :

ORDER

K.K. Sasidharan, J.

1. The respondents in I.A. No. 50/2008 in O.S. No. 28/2004 on the file of the Additional District Judge (Fast Track Court-IV) Bhavani are the petitioners in this Civil Revision Petition.

2. The suit in O.S.No.28/2004 was filed by the deceased Silambana Gounder and the respondent against the revision petitioners praying for a judgment and decree of permanent injunction restraining the revision petitioners and their men and agents from interfering with the peaceful possession and enjoyment of the suit property by the respondent.

3. The suit was contested by the revision petitioners by filing written statement.

4. Subsequently, the trial commenced and P.W.1 was examined and the plaintiff's side was closed. Immediately, the respondent filed an application in I.A. No. 50/2008 to recall P.W.1 for the purpose of marking a document which is stated to be the deposition of the first petitioner in a criminal proceeding wherein she admitted the factum of execution of a will. The said application was opposed by the revision petitioners on the ground that the evidence of a living person cannot be marked in a judicial proceeding unless the attention of the witness was drawn to the particular evidence recorded in an earlier proceeding. However the objection was not acceptable to the learned trial Judge and accordingly the application was allowed. It is the said order which is impugned in this Civil Revision Petition.

5. There is no dispute that by way of recalling P.W.1 the respondent was attempted to mark the evidence tendered by the first respondent in a criminal proceeding in C.C. No. 105/2000 on the file of the Judicial Magistrate II, Gobichettipalayam. It was not the case of the respondent that the first revision petitioner was not available for examination before the Court so as to enable them to contradict the said witness with reference to her earlier statement on oath.

6. The manner of recording evidence and the para meters for adducing evidence is governed by the provisions of the Indian Evidence Act. Section 33 of the Indian Evidence Act states that the evidence given by a witness in a judicial proceeding, or before any persons authorised by law to take it, would be relevant for the purpose of proving in a subsequent judicial proceeding or in a later stage of the

same judicial proceeding, the truth of the facts which he states when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way of the adverse party or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable. Therefore, only in certain specified contingencies it would be possible for a party to mark the evidence tendered by the witness in a judicial proceeding or before any person authorised by law to record evidence. However, even for marking such documents the statute states that the adverse party must have a right and liberty to cross-examine the witness. Therefore only on fulfilling the conditions as made mentioned in the proviso to Section 33 it would be permissible for marking the deposition of a person whose case is covered by Section 33 of the Indian Evidence Act.

7. Section 145 of the Indian Evidence Act permits a party to cross-examine a witness with respect to his previous statements made by him in writing or reduced into writing or relevant to matters in question. However, if it was intended to contradict the witness his attention must be drawn to those parts of the statement which are to be used for the purpose of contradiction. Therefore the witness should be given an opportunity to explain his previous statement so as to use such statement against him.

8. In *Bharat Singh and Ors. v. Mst. Bhgirathi* : AIR 1966 SC 405 the Supreme Court indicated the scope of Section 145 of the Evidence Act, thus:

19. Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under Section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement

used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.

9. The Supreme Court in *Biswanath Prasad and Ors. v. Dwarka Prasad and Ors.* : AIR 1974 SC 117 considered the distinction between substantive evidence and the prior statement of a witness used for the purpose of contradiction and explained the legal position thus:

There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfills the requirements of Section 21 of the Evidence Act: in the later case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*: in the latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by Section 145 of the Evidence Act.

10. The dispute in the present matter relates to a will. It was the case of the respondent that in a previous criminal proceeding the first revision petitioner has admitted the execution of will which was denied subsequently in her statement. Therefore, it was only to contradict the evidence of the first petitioner, the respondent proposed to use her evidence given earlier in the criminal proceeding. However, the fact remains that the first petitioner was not examined as a witness. Even before examining her as a witness on the side of the petitioners/defendants the respondent has taken steps to mark her deposition as exhibit by recalling P.W.1. The proper course would be to cross-examine the first petitioner on the basis of her previous statement given in a judicial proceeding and to cite her attention to the relevant portion of her evidence. It is always possible for the parties to put such questions even in the form of question and answer. Therefore, I am of the view that the course adopted by the learned trial Judge in marking the

deposition of the petitioner in an earlier criminal proceeding has no sanction of law. Therefore the order impugned in this Civil Revision Petition is liable to be set aside.

11. In the result, the order dated 29.10.2008 made in I.A. No. 50/2008 on the file of the Additional District Judge (Fast Track Court IV), Bhavani, is set aside.

12. The Civil Revision Petition is allowed. No costs. Consequently, connected pending miscellaneous petition is also disposed of. No costs.

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