

Satinder Singh Vs. Sukhdev

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Court : Himachal Pradesh

Decided On : May-07-1999

Reported in : AIR1999HP72

Judge : D. Raju, C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 18, Rule 17 and 17A; ;
[Evidence Act, 1872](#) - Section 165

Appeal No. : C.R. No. 254 of 1997

Appellant : Satinder Singh

Respondent : Sukhdev

Advocate for Def. : Dinesh Sharma, Adv.

Advocate for Pet/Ap. : Ramakant Sharma, Adv.

Judgement :

ORDER

D. Raju, C.J.

1. The above revision has been filed by the defendant against the order dated 7-4-1997 passed by the learned Senior Subordinate Judge, Solan, in case No. 497/1 of 1990, whereunder the Court below has chosen to reject an application filed by the defendant-petitioner under Order 18, Rule 17 read with Section 151 of the

Code of Civil Procedure, for recalling the plaintiff, who was examined as P.W. 4, for being further cross-examined.

2. The petitioner in his application before the Court below has stated that in the suit filed by the respondent-plaintiff for declaration and permanent injunction to the effect that he is the owner in possession of the land, the defendant-petitioner filed a written statement refuting the allegations levelled in the plaint and asserted that the defendant is the owner in possession and revenue entries made in this regard are correct. In the course of the trial of the suit, the plaintiff was said to have been examined as P.W. 4 and he seems to have claimed in the box that he is the owner in possession of the disputed land and planted fruit trees and not the defendant. The further claim of the petitioner in the application filed is that it is the defendant who is in possession of the land and the plaintiff has worked as labourer with the defendant and he has issued two receipts on 24-2-1987 in connection with the charges for the work done by him and others in the land of the defendant and those receipts, which were said to have been misplaced and could not be brought to the notice of the plaintiff when he was examined as P.W. 4 and therefore, it has become relevant and necessary to have the same put to the plaintiff and for that purpose he has sought for the recalling of the witness P.W. 4.

3. The said application was opposed by the respondent-plaintiff by contending in the reply filed that the defendant who had full knowledge of the case pleaded by the parties has not chosen to confront P.W. 4 by producing the document now sought to be produced and therefore it is not open to the defendant to fill up the lacuna in the evidence and if the plaintiff is made to appear in the box again to face the defendant, it is likely to put the plaintiff into sufferance and the defendant, who was guilty of negligence cannot be allowed to overcome the same by tiling the application in question and, therefore, it deserves to be dismissed. It is also contended in the said reply that the documents were not relied upon earlier when the issues were framed and the theory of alleged misplacement of document is not to be believed and consequently the plaintiff prayed for the dismissal of the application.

4. The learned Judge in the Court below has chosen to reject the application on the grounds that the defendant in his written statement has nowhere pleaded the fact that the plaintiff has been employed as a labourer by him and he issued the receipts in favour of the defendant acknowledging the receipts of the amount for the work done by him and others, that when the plaintiff appeared as P.W. 4, no such suggestion was ever put to him in the cross-examination and that the attempt of the defendant is to fill up the lacuna, which has come in his case pleaded and that according to the learned Judge in the Court below, a fact which has not been specifically pleaded cannot be proved. Hence, the above revision.

5. Mr. Ramakant Sharma, learned Counsel for the petitioner while placing reliance upon the decisions reported in AIR 1972 All 219 (Smt. Kulsumunnisa v. Smt. Ahmadi Begum), 1998 (1) SJL 290 (Kulwant Singh v. Om Parkash Sud) and (1989) 2 Cur LJ (C & Cri) 670 (Harnek Lal v. Onkar Singh), has contended that the Court below has committed an error in dismissing the application, which will result in grave injustice by denying the defendant of an effective defence in the suit before the Court below and, therefore, the order of the learned Judge in the Court below is liable to be set aside. Per contra, Mr. Dinesh Sharma, learned Counsel for the respondent placed reliance upon the decisions reported in AIR 1978 All 514 (Ram Bali v. Jaipal) and AIR 1966 SC 112 (Abubakar Abdul Inamdar (dead) by LRs v. Harun Abdul Inamdar), to contend that no exception could be taken to the reasons assigned by the learned Judge in the Court below and the order of the learned Judge in the Court below, therefore, does not call for any interference in my hands.

6. I have carefully considered the submissions of the learned Counsel appearing on either side. The decision in AIR 1978 All 515 (supra) is the one where the learned Judge apparently on the facts of the case found that though Order 18, Rule 17 provides the Court with a power, which is necessary for the proper conduct of a case at any stage of the proceedings to recall and further examine a witness and that it can always do so and that the said power can be exercised even at the time of writing a judgment by the Court. It was further held that the power should be used sparingly and in exceptional cases and such power is to be used for removing ambiguities and for clarifying the statement and not for the

purposes of filling up the lacuna in a party's case. It is also observed by the learned Judge that such power can be exercised by the Court at its own initiative or at the instance of a party. On a combined reading of the provisions contained in Order 18, Rule 17 and Section 165 of the [Evidence Act, 1872](#), it would be clear that the power to recall and re-examine a witness is exclusively that of the Court trying the suit and the parties to the suit cannot take any objection to the question asked nor can they be permitted to cross-examine any witness without the leave of the Court. The conclusion found recorded in paragraph 12 of the judgment would go to show that the ultimate decision turned on the facts of that case. In AIR 1996 SC 112 (supra), it has been held that in the absence of a specific plea on any particular issue, no amount of proof can substitute pleadings which are the foundation of claim a litigating party. The proposition laid down by their Lordships of the apex Court in this case is a well settled one and at the same time, in each case only it has to be seen what is the nature of pleadings that could be expected and envisaged to be made and the entire evidence also need not and could not be expected to be disclosed in the form of pleadings, be it in the plaint or the written statement.

7. In AIR 1972 All 219 (supra), a Division Bench of the Allahabad High Court had an occasion to deal with an identical situation where a witness was never cross-examined with reference to a rent receipt which was filed in the Court during the course of his examination and since the omission to cross-examine with particular reference to the rent receipt would render the same inadmissible in evidence, the learned Judges of the Division Bench held that it would be necessary to recall the witness concerned for cross-examination with respect to the receipt under Order 18, Rule 17 and in coming to such a conclusion reliance has been placed by the learned Judges of the Division Bench on a decision reported in AIR 1947 Bom 156 (Madhubhai Amthalal v. Amthalal Nanalal). In (1989) 2 Cur LJ 670 (supra), J.V. Gupta, J., as the learned Judge then was, of the Punjab and Haryana High Court, held that it will be always in the interest of justice to recall a witness to ensure the marking of necessary and relevant document in evidence. A learned single Judge of this Court also in 1998 (1) SLJ 290 (supra), held that recalling of a landlord for further cross-examination or for that matter a witness at any stage of the proceedings, and put such questions as the Court thinks fit was permissible having

regard to object underlying Order 18, Rules 17 and 17-A of the Code.

8. Judging the claims of the respective parties in this case in the light of the principles noticed above and specific provisions in Order 18, Rules 17 and 17-A. I am of the view that the Court below has misdirected itself in rejecting the application and denying the petitioner of an opportunity to recall and examine the plaintiff examined earlier as PW-4 with reference to a particular document, to which the plaintiff was said to have been party by signing and issuing the same. It is by now well settled and often reiterated that the procedural law should be a guide as also handmade to render substantial justice. Unless the law itself provides some serious consequences, on account of any lapse committed, the endeavour of the Court should also be to ensure that all relevant and the best materials are allowed to be brought on record, which could effectively, conclusively and finally adjudicate the dispute between the parties. The power of the Court under Order 18, Rules 17 and 17-A to do so and to direct recalling the re-examining of a witness, who has been examined earlier, to put any questions as the Court may deem fit or to produce evidence not previously known and could not be produced, despite due diligence, cannot be seriously disputed. The question is as to whether in a given case or for that reason in the present case, the request of the petitioner before the Court below is in order and in accordance with law and could have been rejected and refused to be allowed, in the manner it has been done by the Court below. In my view, the Court below in rejecting the request and denying the opportunity to the petitioner-defendant has committed not only a grave error but has chosen to stall a relevant piece of material in evidence being brought on record, which would help the Court itself to effectively decide the issue. The case of the plaintiff is that he is the owner of the property. The defendant in the written statement has categorically stated that the predecessor-in-interest through whom the plaintiff claims was never inducted as a tenant in the suit land and that he was a Chowkidar and the defendant alone is the owner and that he has been cultivating the same by hiring labour. The receipt alleged to have been passed on by the plaintiff himself could not be said to be an extraneous or irregular material in deciding the relationship of the parties and right with reference to the property in dispute and on the other hand it will be one of the relevant piece of evidence necessary also for deciding the question as to whether the plaintiff is really owner

in occupation or possession of the property, as claimed by him. Consequently, the order of the Court below cannot be sustained. The reason assigned by the Court below that no such plea has ever been made is to take a too technical view of the matter as also the manner of appreciation of the matter since, as noticed earlier, the party to a proceeding, is not obliged to disclose the entire evidence also in the pleadings before he should be allowed to prove them in evidence. If the defendant is asserting ownership and possession in his own right as against the contra claim of the plaintiff being such owner and person in occupation, it is beyond comprehension as to how the receipt, if really, was found to be issued by the plaintiff could not be relevant one for the purpose of proving such a case. Therefore, there is no merit, whatsoever, in the hypothetical reasons assumed and assigned by the learned Judge in the Court below. Even that apart, I am of the view that the parties should have all opportunities to bring the best of the material in their possession and if ultimately the Court comes to the conclusion that this or that material is neither relevant nor credible, it is always open to a Court to assess the evidence on its own merit, but that by itself is no reason to even on the threshold, prevent the materials being brought on record at a stage even before the trial is complete.

9. For all the reasons stated above, the order of the learned Judge in the Court below is set aside. The application filed by the petitioner-defendant is allowed and the learned Judge in the Court below is directed to recall PW-4 and proceed with the matter in accordance with law after due opportunities to both the parties. No costs.

10. Interim stay granted already shall stand vacated.

CMP No. 244/98

11. In view of the order passed in the main revision, no further orders are required in this application and the same is rejected.