

Kesar Vs Nihali Kumari**Civil Writ Petition No. 13829 Of 2019**

Court: Rajasthan High Court**Date of Decision:** Sept. 25, 2019**Acts Referred:**

Code Of Civil Procedure, 1908 & Order 16 Rule 3#Constitution Of India, 1950 & Article 227

Hon'ble Judges: Dinesh Mehta, J**Bench:** Single Bench**Advocate:** Sharad Kothari**Final Decision:** Dismissed

Judgement

1. The defect No.3 pointed out by the Registry being unsubstantial, is overruled.

2. Feeling aggrieved of the order dated 26.08.2019, passed by learned Senior Civil Judge, Barmer (hereinafter referred to as the Trial Court),

the petitioner has invoked supervisory jurisdiction of this Court conferred by Article 227 of the Constitution of India.

3. Facts appertain, narrated with brevity, are that an election petition came to be filed by the respondent, against the petitioner, an elected Sarpanch.

The election petition was filed with the allegation that the petitioner has contested the election on the basis of forged and fabricated documents

including mark-sheet and transfer certificate. During the pendency of the election petition, when the exhibits were being marked on the documents,

petitioner moved an application dated 20.10.2018 under Order XVI Rule 3 of the Code of Civil Procedure and prayed that the Secretary of the Board

of Secondary Education, Uttar Pradesh be summoned for proving the veracity of the certificates issued in her favour. The reason for calling the

Secretary, as indicated in the application, was that since there were two certificates with same roll number issued in names of two different persons, it

is only the Secretary concern, being scribe of the certificate (A/2), who can prove the certificate, which was issued to the petitioner.

4. Be that as it may, the petitioner's said application came to be rejected by the trial Court, vide its order dated 22.11.2018. A writ petition came to

be filed by the petitioner challenging the said order of the trial Court, being SB Civil Writ Petition No.134/2019.

A Coordinate Bench of this Court, vide its order dated 15.01.2019 dismissed the said petition with the following observation/clarification :

"Needless to say that the burden of proving a document on the anvil of admissibility with reference to the provisions of the Indian Evidence Act is

on the party who relies upon the same. The document (Ex.A/2) was exhibited by the plaintiff. Mere marking of exhibit on the document would not

mean that its admissibility as substantive piece of evidence has been decided by the Court without any scope for rebuttal. The petitioner would have

the opportunity to assert before the court at the stage of final arguments that the document cannot be read in evidence in absence of the concerned

witness being summoned to prove the same. As and when such argument is advanced, the trial court shall be under an obligation of law to decide the

same objectively and by assigning proper reasons. The observation made by the learned trial court in the impugned order that there is no requirement

of summoning the Secretary of the Education Board concerned would not in any manner prejudice the right of the petitioner to question the

admissibility of the document at the stage of final arguments."

5. For completing the narration of the facts, apt it to mention that the petitioner had preferred an intra-court appeal against the order dated 15.01.2019,

being DB Special Appeal (Writ) No.119/2019. Petitioner's appeal too came to be dismissed vide its order dated 05.07.2019, while observing thus :

"The appellant-defendant has sufficient opportunity in the pending proceedings to prove veracity of the material which she wants to rely upon.

Thus, there being no merit in the appeal, the same is dismissed."

6. When the matter was still at the stage of petitioner's evidence on 19.08.2019, she filed another application under Order XVI Rule 3 of the Code

with almost identical averment and prayer seeking to call the Secretary of Secondary Shiksha Parishad, Uttar Pradesh in the witness box, so that the

certificates/documents issued in her favour can be proved.

7. The petitioner's subsequent application too, came to be rejected by the trial Court, vide its order dated 26.08.2019, interalia observing that there

is no need to summon the Secretary of the concerned Board. By bringing to the notice of the trial Court, the order dated 15.01.2019 passed by this

Court, it was argued that such liberty has been given to her, by the High Court. The trial Court, however, rejected petitioner's application while

imposing cost of Rs.2000/-.

8. Oppugning the order dated 26.08.2019 passed by the learned Court below, learned counsel for the petitioner contended that in view of the liberty

granted by this Court, vide its order dated 15.01.2019, the petitioner was well within her rights to move the subject application under Order XVI Rule 3

of the Code, because the Court had observed that stage of filing the application had not yet come. In a bid to highlight the difference in the stage, Mr.

Kothari urged that earlier application under Order XVI Rule 3 of the Code was filed, when the case was at the stage of exhibiting the documents,

whereas the subject application has been filed, when the case reached the stage of recording of petitioner's evidence.

9. He argued that but for deposition of the Secretary concerned, the petitioner will not be able to prove the documents i.e. mark-sheet and certificate

in her favour and thus, summoning of the Secretary of the concerned Board was not only imperative, but was essential, given the fact he was the

scribe or author of the documents, which the petitioner wanted to prove. He argued that in view of the liberty granted by the learned Single Judge, so

also by the Division Bench of this Court, the trial Court ought not to have rejected petitioner's application. That apart, learned counsel submitted

that the reasons of rejecting the application, which have been given by the trial Court, are not at all germane to the decision.

10. In a bid to give legal support to his arguments, learned counsel relied upon the judgment of this Court in the case of Vimla Devi Vs. Suman & Ors

in SB Civil Writ Petition No.16600/2017 decided on 13.10.2017.

11. I have heard learned counsel for the petitioner and perused the material available on record.

12. Concededly, petitioner's identical application filed earlier had been rejected by the trial Court, vide its order dated 22.11.2018, which order has

been affirmed by this Court. True it is, that while rejecting petitioner's writ petition, the Coordinate Bench of this Court, on 15.01.2019, had given

liberty to the petitioner, but such liberty cannot be construed to be a leave to move a fresh application for summoning the witness.

13. A perusal of the operative portion of the order dated 15.01.2019, passed by Coordinate Bench of this Court (reproduced in para No.4 above),

leaves no room for ambiguity that the liberty granted to the petitioner, rather confined, was only to raise the question of admissibility of the certificate

so produced by the petitioner and the respondent (election-petitioner), in absence of the author of the document having come in the witness box. No

liberty was, however, granted to the petitioner to move a fresh application for summoning the said witness at a subsequent stage.

14. It is settled proposition of law that principle of res judicata is applicable even at different stages of suit; once an application has been rejected, the

party to the suit cannot move another application, for the same relief or for the same cause, as held by Hon'ble the Supreme Court in the case of

Satyadhan Ghosal & Ors. Vs. Deorajin Devi & Ors reported in AIR 1960 SC 941.

15. It appears that the petitioner's concern could not be appropriately dealt with by the learned Single Judge at the earlier round of litigation, which

has been duly noticed by the Division Bench, in its order dated 26.04.2019. The petitioner, as a matter of fact, wanted to summon the Secretary to

prove the certificate issued in her favour, but while deciding petitioner's earlier writ petition, the Court took it as if the same was election-

petitioner's (respondent's) application, which had been rejected.

16. Be that as it may, said order has attained finality, as Division Bench has also approved it, by dismissing petitioner's special appeal there

against.

17. Having considered petitioner's case, this Court finds that petitioner's apprehension is misplaced. Petitioner wants to prove the certificate

issued by the Secretary fearing that if the Secretary does not come in the witness box, the certificate issued to her will not be proved. If that be so,

how can the certificate issued by the same Secretary showing the certificate to be in other candidate's name, relied upon by the respondent, be

election petitioner will be treated proved. Both the certificates, relied by the petitioner and the respondent sail in the same boat.

18. So far as the judgment of this Court in the case of Vimla Devi (supra) is concerned, the same is on merit of the case to the effect that the

Secretary "Author of the document concerned, is necessary to be brought in the witness box. Such proposition of law cannot be disputed, however,

the same was to be considered at the stage, when the petitioner's first application came to be rejected.

19. In view of the facts obtaining in the case at hands, even if this Court finds substance in what was claimed by the petitioner, in the face of orders

passed by this Court in petitioner's earlier round of litigation, no indulgence can be granted.

20. The writ petition, therefore, fails.

21. The stay application is also dismissed.