

Subash Chander Vs Shri Bhagwan Yadav

Court: Delhi High Court

Date of Decision: Nov. 25, 2009

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 13 Rule 1(3), Order 13 Rule 7, Order 7 Rule 14(4), Order 8 Rule 1A(4)

Constitution of India, 1950 – Article 227

Evidence Act, 1872 – Section 145, 45

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Kuldeep Balhara, for the Appellant; Vikas Yadav, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

This petition raises questions of general importance, arising frequently in trials. The questions can be framed thus:

(i) What is the challenge/fate of the documents produced for the first time during the cross examination of a witness and which are denied by the

witness? Whether the said documents are required to be retained/kept on the court file or merely because the witness has denied the document,

the same has to be returned to the party which has produced the same?

(ii) If the said documents are to be kept on record/retained, what is the status thereof?

(iii) Whether a party producing the said document can prove the same at the stage of his own evidence or for the reason of having not produced it

along with its plaint/written statement and having chosen to use it only during cross examination, is then barred from treating the document as own

document and proving the same? Since I am unable to find any judgment completely considering the aspects and further since in my opinion these

questions plague the courts on a daily basis, it is deemed appropriate to answer the same.

2. This petition under Article 227 of the Constitution of India is preferred by the defendant in the suit before the Trial Court and against the order

dated 20th October, 2008 dismissing the application of the petitioner/defendant u/s 45 of the Indian Evidence Act.

3. The respondent/plaintiff instituted the suit from which this petition arises against the petitioner/defendant for recovery of money. It is inter alia the

case of the respondent/plaintiff that he is the owner of certain land which had been acquired from the predecessor of the petitioner/defendant; that

a notification for acquisition of the said land was issued; that he applied for compensation for such acquisition; however the petitioner/defendant

filed objections against the release of compensation to the respondent/plaintiff and which objections were subsequently withdrawn by the

petitioner/defendant; that owing to the objections having been filed, the release of compensation to the respondent/plaintiff was delayed. The

respondent/plaintiff claims interest on the amount of compensation for the period of delay, so caused by the petitioner/defendant.

4. The petitioner/defendant contested the suit inter alia by controverting that the land had been transferred by his predecessor to the

respondent/plaintiff/his predecessor; that the respondent/plaintiff had taken advantage of the illiteracy of the father of the petitioner/defendant and

cheated him out of the land. The petitioner/defendant admitted having filed objections to the release of compensation to the respondent/plaintiff and

also admitted having withdrawn the said objections. It is, however, his plea that the objections were withdrawn owing to compromise having been

arrived at between the parties; however, the respondent/plaintiff again mischievously got the withdrawal application signed from him without

disclosing that it had been falsely written therein that the petitioner/defendant had no documents of ownership of the land.

5. The petitioner/defendant during the cross examination of the respondent/plaintiff put to him a hand written document purporting to be a draft of

the application for withdrawal of objections. It is inter alia the case of the petitioner/defendant that the said document is in the handwriting of the

respondent/plaintiff and the withdrawal of objections was to be in terms of the said document. The respondent/plaintiff however when confronted

with the said document denied the same to be in his handwriting and also denied the same to be the draft of the application for withdrawal to be

filed and also denied any knowledge thereof. Ex.PW1/D1 was put on the said document and the same retained on file.

6. It is thereafter that the petitioner/defendant filed the application u/s 45 of the Indian Evidence Act (for comparison of handwriting on the said

document with admitted handwriting of the respondent/plaintiff) and which has been dismissed by the order impugned in this petition. The trial court

has held:

(a). That the petitioner/defendant has not mentioned the said document in his written statement; that the said document was not in accordance with

the application for withdrawal of objections ultimately filed and copy whereof had been proved on the suit file.

(b). That the counsel for the respondent/plaintiff, at the time when the said document was confronted to the respondent/plaintiff had also raised

objection as to the production, admissibility and mode of proof of the said document and the document was taken on record subject to the

objections of the respondent/plaintiff. The Trial Court thus held that no case for comparing the handwriting on the said document with the admitted

handwriting of the respondent/plaintiff arises.

7. This court while issuing notice of this petition held that the Trial Court before considering the application u/s 45 of the Evidence Act, should have

first decided whether the document could be taken on record or not. Notice of the petition was issued to this limited extent.

8. Order 7 Rule 14(4), Order 8 Rule 1(A)(4), as well as Order 13 Rule 1(3) provide that the provisions requiring parties to file documents along

with their pleadings and/or before the settlement of issues do not apply to documents produced for the cross examination of the witnesses of the

other party. To the same effect, Section 145 of the Evidence Act also permits documents to be put to the witnesses, though it does not provide

whether such documents should be already on the court record or can be produced/shown for the first time. However, in view of the unambiguous

provisions of the CPC, it cannot be held that the document cannot be produced/shown for the first time during cross examination. If the witness to

whom the said document is put, identifies his handwriting/signature or any writing/signatures of any other person on the said document or otherwise

admits the said documents, the same poses no problem, because then the document stands admitted into evidence. However, the question arises

as to what is the course to be followed if the witness denies the said document. Is the document to be kept on the court file or to be returned to the

party producing the same?

9. This question also in my view is also not difficult to answer. It cannot possibly be said that the document should be returned to the party. If the

document is so returned it will not be possible for the court to at a subsequent stage consider as to what was the document put and what was

denied by the witness. In a given case, it is possible that the answer of the witness on being confronted with the document may not be

unambiguous. It may still be open to the court to consider whether on the basis of the said answer of the witness, the document stands admitted or

proved or not and/or what is the effect to be given to the said answer. Thus, the document cannot be returned and has to be necessarily placed on

the court file.

10. The next question which arises is that if the document is so placed on the court file, whether it becomes/is to be treated as the document of the

party producing the same and is that party entitled to prove the said document notwithstanding having not filed the same earlier, as required by law,

or the use of the said document is to be confined only to confront the witness to whom it was put and it cannot be permitted to be proved by that

party in its own evidence.

11. The legislative intent behind Order 7 Rule 14(4) and Order 8 Rule 1A(4) and Order 13 Rule 1(3) appears to be to permit an element of

surprise, which is very important in the cross examination of witnesses. A litigant may well be of the opinion that if the document on the basis

whereof he seeks to demolish the case of the adversary is filed on the court record along with pleadings or before framing of issues, with resultant

knowledge to the adversary, the adversary may come prepared with his replies thereto. On the contrary, if permitted to show/produce the

document owing to element of surprise, the adversary or witness, may blurt out the truth. Once it is held that a litigant is entitled to such right, in my

view it would be too harsh to make the same subject to the condition that the litigant would thereafter be deprived of the right to prove the said

documents himself. Thus, if the witness to whom the document is put in cross examination fails to admit the document, the party so putting the

document, in its own evidence would be entitled to prove the same. However, the same should not be understood as laying down that such party

for the said reason and to prove the said document would be entitled to lead evidence which otherwise it is not entitled to as per scheme of CPC

and evidence law. For instance, if the document is shown by the defendant to the plaintiff's witness and the plaintiff's witness denies the

same, the defendant can prove the document in his own evidence. Conversely, if the plaintiff puts the document to the defendant's witness and

the defendant's witness denies the same, the plaintiff if entitled to lead rebuttal evidence would in his rebuttal evidence be entitled to prove the

same. However, if the plaintiff has no right of rebuttal evidence in a particular case, the plaintiff would not be entitled to another chance to prove

the document. In such a case, the plaintiff has to make a choice of either relying upon the surprise element in showing the document or to file the

document along with its pleadings and/or before the settlement of issues and to prove the same. Similarly, if the defendant chooses to confront the

document to the plaintiff's witness in rebuttal, merely because the witness denies the document would not entitle the defendant to a chance to

prove the document subsequently.

12. I may however put a line of caution over here. It is often found that a party which has otherwise failed to file documents at the appropriate

stage, attempts to smuggle in the documents in the evidence of the witness of the adversary by putting the documents to the witness whether

relevant to that witness or not. The court should be cautious in this regard. Only those documents with which the witness is concerned and/or

expected to know or answer ought to be permitted to be put to the witness in the cross examination. If other documents with which the witness is

not concerned are confronted only in an attempt to have the same filed and to thereafter prove the same, the court would be justified in clarifying

that the document is taken on record only for the purpose of cross examination and the producing party would not be entitled to otherwise prove

the same, having not filed it at the appropriate stage.

13. During the course of the hearing, the counsel for the petitioner relied on T.M. Mohana Vs. V. Kannan, laying down that prior leave of the

Court is not necessary for producing documents in cross examination.

14. The counsel for the respondent has relied on:

(i) Poonam Chawla v. Niranjan Kumar 2009 (109) DRJ 534 which is closest to the case in hand. In that case, the defence of the defendant had

been struck off. The defendant in the limited opportunity of cross examination available to him put to the plaintiff certain documents which were

denied by the plaintiff. The defendant thereafter applied to the Court for comparison of the handwriting on the said document with the admitted

handwriting of the plaintiff. The argument of the counsel for the plaintiff was that allowing the said application would tantamount to permitting the

defendant to prove the documents in his defence and which right he had lost. It was held that what a party is prohibited in law from doing directly,

it cannot achieve the same by an indirect method. However, this Court while holding so also observed that the handwriting could be compared on

documents which form part of the record and accepted the contention of the counsel for the plaintiff that the documents put in cross examination

and denied by the plaintiff did not form part of the record. Though, the said observation of another Single Judge of this Court is contrary to the

conclusion reached by me above, but I have not deemed it necessary to refer to the matter to a larger bench because the Court in that case was

swayed by the defence of the defendants having been struck off.

(ii) Bondar Singh and Others Vs. Nihal Singh and Others, . This judgment was cited by the counsel for the respondent/plaintiff in support of the

proposition that the document Ex.PW1/D1 in the present case was not pleaded by the petitioner/defendant in his evidence and for this reason also

no evidence with respect thereto can be lead. However, in the facts of the present case, it cannot be said that there is no pleading to support the

document Ex.PW1/D1. The petitioner/defendant has in the written statement pleaded that the withdrawal application which was filed in the court

had been got signed from him mischievously and not in accordance with the compromise arrived at between the parties. The counsel for the

petitioner/defendant contends that Ex.PW1/D1 is the document in proof of the said settlement. The petitioner/defendant was in the written

statement not required to plead documents or evidence and on a reading of the written statement of the petitioner/defendant, copy whereof was

handed over during the course of hearing, I find that the necessary plea in support of the document does exist.

(iii) Haren Krishnakumar Mehta Vs. Kamla Pribhdas Nebhanani, . This is again on the aspect of rejection of evidence beyond pleadings.

However, in the present case, I find foundation for reception of Ex.PW1/D1 into evidence having been laid in the written statement of the

petitioner/defendant.

(iv) S.M. James and Another Vs. Dr. Abdul Khair, where on an interpretation of Order 13 Rule 7 it was held that documents admitted in evidence

are only those documents that can legally be on record and other documents cannot be on record of the suit even if found amongst the papers on

record. In the present case, evidence is still underway and the stage for sifting documents has not reached. In view of conclusion reached above,

the document Ex.PW1/D1 is legally on record till this stage.

15. I answer the questions framed above accordingly. This petition succeeds and is allowed. The petitioner/defendant was entitled to put the

document in cross examination of the respondent/plaintiff; notwithstanding the denial by the respondent/plaintiff, the petitioner/defendant is entitled

to otherwise prove the said document. Since the scope of this petition vide order dated 4th March, 2009 was restricted to the above, the Trial

Court to now decide the application of the petitioner/defendant u/s 45 of the Evidence Act in accordance with the legal position enumerated

above.

The parties are left to bear their own costs.