

(2001) 12 KL CK 0048

High Court Of Kerala

Case No: C.R.P. No. 3029 of 2001

Raveendran

APPELLANT

Vs

Ramakrishnan Nambiar

RESPONDENT

Date of Decision: Dec. 6, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 18 Rule 1, Order 18 Rule 17, Order 18 Rule 17A, Order 18 Rule 2, Order 18 Rule 2(4)
- Evidence Act, 1872 - Section 118, 135

Citation: (2002) 1 CivCC 493 : (2002) 2 ILR (Ker) 359 : (2002) 1 RCR(Civil) 830

Hon'ble Judges: S. Sankarasubban, J

Bench: Single Bench

Advocate: N.L. Krishnamoorthy and R. Surendran, for the Appellant; O. Ramachandran Nambiar and Bindumol Joseph, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S. Sankarasubban, J.

This Civil Revision Petition is filed by the plaintiff in O.S. No. 118 of 1999 on the file of the Additional Sub Judge, Thalassery. The suit was filed by him for realisation of a sum of Rs. 20,79,953/- with interest from the date of the suit till realisation. According to the plaintiff, the amount was due from the defendant as per a cheque for Rs. 20,00,000/-, which was dishonoured for insufficient funds in the account of the defendant.

2. The plaintiff and the defendant are non-resident Indians working at Manama in Bahrain. The original transaction between the plaintiff and the defendant took place at Bahrain from where the defendant owed a sum equivalent to Indian Rs. 20,00,000/- and issued the cheque payable at Vijaya Bank, Edakkad Branch within the jurisdiction of the Sub Court, Thalassery.

3. The defendant entered appearance and filed written statement denying the transactions. He admitted that the plaintiff and the defendant were friends and he contended that he used to keep signed cheques in his drawer in the room and he suspects that the plaintiff has fraudulently removed some cheques and utilised the same for creating false documents in his favour. He also stated in the written statement that he is not in a position to say whether the signature in the cheque is his or not.

4. On the basis of the contentions, five issues were raised. Since the plaintiff was at Baharin, the suit was filed through his power of attorney holder. According to the plaintiff, the suit was listed for trial on 2.1.2001. On that day, the plaintiff had come to Indian for the purpose of adducing evidence. But in the meantime, the defendant filed I.A. No. 4281 of 2000 for issue of a commission for the purpose of assessing the value of the plaint schedule property. Hence, the suit was not taken up for trial on 2.1.2001 and it was removed from the list. Subsequently, I.A. No. 4281 of 2000 was allowed and commission was issued. Thereafter, the Commissioner filed his report. By that time, the plaintiff went aborad again to join his employment. According to the plaintiff, he was under the impression that he can come when the suit is listed again.

5. The suit was again listed on 1.11.2001 for trial. Since the plaintiff could not get leave from his employer at Baharin, he sent the additional documents to his power of attorney holder and filed in the court through him. The documents were received by the court below. Since the plaintiff could not come to the court on 1.11.2001, the power of attorney holder was examined as PW1 and marked Exts. A1 to A11. He was cross examined on 2.11.2001. the Manager, Vijaya Bank, Edakkad was examined as PW2 and Ext. X1 was produced and marked. Since the petitioner was not able to come to the court on that day, a request was made to the court for granting time to get the revision petitioner himself examined. This is because the power of attorney holder was not able to give evidence relating to the transactions took place at Baharin. In the meantime the revision petitioner was making efforts to get leave from his employer to come to India. The court below rejected the request and closed the evidence of the plaintiff and adjourned the case to 6.11.2001 for the purpose of defendant's evidence.

6. According to the plaintiff, the defendant admitted that Et. A2 cheque contained his signature and Ext. A11 agreement contained his signature and thump impression. According to the petitioner, it was for the first time in evidence that the defendant denied his signature. He also stated that he does not have any objection in subjecting the disputed signatures and thump impression contained in Exts. A2 and A11 to an examination by an expert.

7. After the evidence of the defendant, a petition was filed by the plaintiff as I.A. No. 3258 of 2001 to obtain the signatures and thump impression of the defendant and send the same along with Exts. A2 and A11 to an expert for getting an opinion

regarding the genuineness of the signatures contained in Exts. A2 and A11 and thumb impression contained in Ext. A11. Another petition was filed As I.A. No. 3260 of 2001 to reopen the evidence of the petitioner for the purpose of examining the original plaintiff himself as he could get air ticket and conveyance only then. The case was posted to 8.11.2001 for arguments. The petitions were numbered and notice was given to the defendant. The revision petitioner came from Bahrain on 7.11.2001 and he was ready for adducing evidence. On 8.11.2001, there was no sitting and the case was adjourned to 12.11.2001.

8. On 12.11.2001, the defendant filed counter in both the petitioner opposing seriously. The applications were heard. The original plaintiff himself was present in court and his presence on that day was brought to the notice of the court. The case was posted to 13.11.2001 for orders. On that day, both the petitions were dismissed. It is against the above order that the present revisions is filed.

9. Sri. N.L. Krishnamoorthy appeared for the petitioner and Sri. O. Ramachandran Nambiar appeared for the respondent.

10. Learned counsel for the petitioner submitted that in the written statement filed by the defendant he did not deny the signatures in the document. On the other hand, his case was that the plaintiff and defendant were friends and plaintiff used to visit the room where the defendant was staying. Defendant used to keep signed cheque in his drawyer in the room. It was for the first time that he denied his signature when he was examined. Counsel submitted that when the case was earlier posted in the list, the plaintiff had come all the way from Bahrain. But at that time, the case was removed from the list. Learned counsel for the petitioner submitted that the court has always jurisdiction to reopen the case for evidence. It was submitted on behalf of the respondent that the plaintiff's power of attorney was examined and evidence was given. Hence, there is no necessity to examine the plaintiff again. He further submitted that the only option to the plaintiff was under Order 18 of the CPC and he could have requested the court for his examination. Such a request was not made here. The question of reopening the evidence is a discretion vested under Order 18 Rule 3A of the CPC and so far as Order 18 Rule 3A of the CPC is concerned, where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the court, for reasons to be recorded, permits him to appear as his own witness at a later stage. According to him, it has been the practice of the civil courts to take evidence of the plaintiff before the evidence of the defendant. Hence, the plaintiff cannot request for the evidence unless the evidence of the defendant's witness are over. There are no exceptional circumstances in this case, which requires exemption. Learned counsel also brought to my notice Order 18 Rules 1, 2 and 3A of the CPC and Sections 118 and 135 of the Evidence Act. Learned counsel also cited before me, the following decisions: (1) Bhanumathy Vs. M. Venkatesan and Others, (2) Marappa Gounder and Ors. v. Sellappa Gounder and Ors. AIR 1985 Mad. 183, (3)

Ayyasami Gounder and Ors. v. T.S. Palanisami Gounder 1990 Mad. 237 , (4) [Dr. V.K. Muthusamy Vs. M/s. U.A. Habeen Firm and others](#), (5) Kaladharan v. Kamaleswaran - 2000 (2) KLT 363, (6) Raveendran v. Raja 1992 (2) KLT 102 and (7) Jortin Antony v. Sree Padmanabha D. Marthanda Varma 2001 (1) KLT 511. Learned counsel also brought to my notice the decision reported in Sadasivan v. Dinakaran 1988 (1) KLT 20.

11. After considering the rival arguments, I am of the view that the order of the court below is wrong. Order 18 of the CPC deals with hearing of the suit and examination of witnesses. After the issues are raised and the parties produced the necessary documents, the case is posted for trial. The right to being is on the person, who has to discharge the burden on the basis of the issues raised in the case. Order 18 Rule 1 gives right to the plaintiff to being unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to being. Otherwise, the right to being rests with the plaintiff. Order 18 Rule 2 deals with the statement and production of evidence. It says that on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to being shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence, if any, and may then address the court generally on the whole case. Rule 2(4) states that notwithstanding anything contained in this rule, the court may for reasons to be recorded, direct or permit any party to examine any witness at any stage. Order 18 Rule 3 deals with evidence where there are several issues. It says that where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party, and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning: by the party beginning will then be entitled to reply generally on the whole case. Rule 17 enables the court to recall and examine witness. Under Rule 17A, where a party satisfies the court that after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the court may permit that party to produce that evidence at the later stage on such terms and may appear to it to be just.

12. Section 118 of the Indian Evidence Act states that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Section 135 of the Evidence Act deals with order of production and examination of witnesses, which says that the order in which witnesses are

produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law by the discretion of the Court.

13. Thus, going by the above provisions, normally, the plaintiff has to examine his witness before the defendant's witnesses are examined. The question here is whether in the particular case, the plaintiff is entitled to get himself examined after the closure of the case of the defendant. No doubt, a witness cannot be examined just to plug the loopholes. There will be circumstances, where a party due to certain circumstances would not have been able to adduce evidence earlier or after the examination of the witnesses on both sides, it may happen that certain aspects, which both parties originally thought to have been admitted have been given a go-bye in the evidence or as stated in Rule 17 due to exceptional circumstances a party could not have produced evidence earlier. According to me, there may also circumstances that for a just decision in the case, some more evidence is necessary. I am referring to this because even after a suit is disposed of on an appeal under Order 41 Rule 27, the Appellant Court is entitled to allow the party to adduce evidence on certain conditions. If these conditions exist at the conclusion of the trial, normally, the court may be entitled to adduce further evidence.

14. The decision reported in *Sadasivan v. Dinakaran* 1998 (1) KLT 20, is a case regarding the examination of witness. In that case, there was a petition to allow the petitioner to give evidence in the court after the witness were examined. He produced medical certificate from the Doctor who advised him to take rest during the period when the trial was going on. It was opposed on the ground that at the time of examination no permission was sought to examine the petitioner as last witness and hence, the petition cannot be allowed. The court relied on Rule 3A and held as follows:

"Rule 3A makes the position very clear that as a general rule the party is to examine himself before his witnesses are examined before the court. Of course it is always within the discretion of the court to allow a party to appear as a witness at a later stage for reasons to be recorded by it. The imperative mandate that a party shall always be examined before any other witness of his has been examined is subject to the discretion of the court in appropriate cases to allow his examination subsequently. The C.P.C. does not prescribe any time limit for seeking such permission. It is always better for the party concerned to get the necessary permission of the court at the stage of commencing his evidence as a matter of abundant caution. But if sufficient ground is made out the party may secure such permission even at a later stage."

15. In *Bhanumathy Vs. M. Venkatesan and Others*, Order 18 Rule 3A came up for interpretation. That was a case for partition and separate possession filed by the wife residing at Madras in the Court at Salem. As such was not in a position to go to Salem to attend hearing every time she deputed her husband who used to contact

for previous advocate and intimate her about stage of hearing. The husband was authorised to appear and he had attended the proceedings with her consent. On date when case was posted for arguments the counsel made an endorsement that he is not claiming any right or share against respondents and his properties. Her husband was in charge of case right from beginning and gave evidence on her behalf and consented for making endorsement on plaint. On date of judgment the plaintiff/wife could not ask herself to be examined. In view of Order 18 Rule 3A she having not exercised her right to be examined as a first witness in beginning of trial, and having not reversed her right by order of court to examine herself later on, she could not ask for reopening of the case. In that case, the court held that Rule 3A is not applicable. Ayyasami Gounder and Ors v. T.S. Palanisami Gounder AIR 1990 Mad. 237 , is a case where the second defendant filed an application to examine himself after the examination of the witness. Dealing with the contention, the court held that failure of persons to give reasons for examining himself at later stage should be examined. A perusal of the facts of the case will show that no reason is stated as to whey he could not be examined earlier. In Dr. V.K. Muthusamy Vs. M/s. U.A. Habeen Firm and others, , the court considered the reason of the petitioner for examining him and found that the reasons stated were not acceptable and thus permission was not granted.

16. Thus, in all these cases what has been granted is that the right for the party to be examined later is not denied. But in individual case, the reasons stated are not given for allowing a party to be examined. As already stated, normally, the rule is that the plaintiff has to be examined first and thereafter, the defendant's witness should be examined and normally, the parties will not be allowed to adduce evidence later. Order 18 Rule 17 gives power to the court to recall and examine witness. In this case, earlier the plaintiff was at Bahrain and was present in court when it was included in the list. But subsequently, it was removed from the list. Later, when it was included in the list, the plaintiff's power of attorney holder was examined. Before closing the evidence, it is stated on behalf of the plaintiff that some time may be granted to him, so that he can come from Bahrain. But that was not granted. On the other hand, the court proceeded with the evidence of the defendant. Before the closure of the evidence of the defendant, an application was made to reopen the case for allowing the plaintiff to be examined and it seems, the plaintiff was present on that day on which the I.A. for reopening was being heard. The reason now stated is that certain things in the transaction were effected in the presence of the plaintiff and only he can testify regarding that. He could not attend earlier because tickets were not available immediately to come from Bahrain. Further contention is that during the evidence of the defendant, a change in the earlier admission was made by him regarding the attested signature and this has necessitated examination of the plaintiff. Court below merely on the ground that no permission was sought earlier, dismissed the petition.

17. After going through the entire matter, I am of the view that it is a case where the court should have allowed the application for examining the plaintiff. The fact that he appeared earlier when the case was listed is not denied. The court should also take note of the difficulties experienced by the litigants, especially, those, who are employed in foreign countries to come and give evidence. Hence, I allow the petition to give an opportunity to the plaintiff to come and give evidence. I am of the view that the petition for expert evidence can be considered after the closure of the evidence of the plaintiff. Hence, I set aside the impugned orders and remit the matter to the court below.

Civil Revision Petition is disposed of as above. Parties shall appear in the court below on 11.12.2001 and the plaintiff shall be examined on that day.

18. Issue photo copy today itself.