

(2012) 05 DEL CK 0572

Delhi High Court

Case No: I.A. No. 4522 of 2012 in CS (OS) No. 416 of 2004

Sh. Kavi Ghei

APPELLANT

Vs

Rohit Vaid and Others

RESPONDENT

Date of Decision: May 3, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151
- Evidence Act, 1872 - Section 137

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: N.S. Vashisht, for the Appellant; Rajiv Nayar, with Mr. Abhimanyu Mahajan, Ashish Dholakia and Mr. Akash Kakkar for defendant No.3., for the Respondent

Judgement

Manmohan Singh, J.

By this order, I propose to decide the present application filed by the plaintiff u/s 151 CPC for expunging/deleting the cross-examination of DW-1 and DW-2 by the defendant No.3. In the present suit, the defendant No.4 was examined and discharged, vide order dated 13.11.2011. Admittedly, DW-3 tendered his evidence by way of affidavit as Ex.DW-3/A before the Joint Registrar on 19.04.2011. His cross-examination was deferred at the request of the learned counsel for the plaintiff. After examination of DW-4, when DW-3 was present on 30.11.2011, a statement was made by the learned counsel for the plaintiff that he would cross-examine this witness after the cross-examination by defendants No.1 and 2. Thereafter, the matter was listed before Court to resolve the said controversy.

2. Few facts as per plaintiff's averments are that the defendants No.1 and 2 agreed to sell the suit property to the plaintiff for a sum of Rs. 3,22,50,000/-. Certain payments were made and agreement to sell was executed on 21.03.2004. The time period for the performance of the terms of the agreement to sell dated 21.03.2004 was up to 15.05.2004. Later on, the plaintiff received a letter dated 21.04.2004 from

the defendants No.1 and 2 whereby they cancelled the said agreement to sell dated 21.03.2004 and it was transpired that the said suit property was sold to the defendant No.3 vide registered Sale Deed dated 21.04.2004.

3. The case of the defendants No.1 and 2 is that the plaintiff was not ready and willing to perform his part of the agreement and he in fact wanted to sign a new Sale Agreement for a Rs. 2 crores through cheque and rest of the money was not shown towards the sale of property. The agreement to sell was cancelled under these circumstances by the defendants No.1 and 2. They submit that the sale deed dated 21.04.2004 is a valid and legal document and the suit property was validly sold to defendant No.3.

4. The case of the defendant No.3 is that he is a bona-fide purchaser without having knowledge of a valid and subsisting agreement to sell.

5. The issues in the above said matter were framed on 29.08.2005. The plaintiff led his evidence. The evidence by the plaintiff was completed on 30.03.2009 and thereafter, the defendants No.1 and 2 led their evidence. The case of the plaintiff is that the defendants No.1, 2 and 3 are not adversaries as required u/s 137 of the Indian Evidence Act, 1872, and therefore, the defendants have no right to cross-examine inter-se. They are supporting each other and have common case.

6. It is also the contention of the plaintiff that the defendant No.3 ought to have cross-examined the defendants No.1 and 2 before the plaintiff had proceeded to cross-examine the said witnesses. (In the present application, there are two prayers namely (a) that the cross-examination of defendants No.1 and 2 already conducted by the defendant No.3, after the cross-examination by the plaintiff, be expunged and deleted (b) that the defendant No.3, who is now to be cross-examined, first be cross-examined by the defendants No.1 and 2 and prior to cross-examination of the plaintiff.) Mr Vashisht on the last date of hearing, i.e., 21.03.2012, had agreed that as far as first prayer is concerned, he is not pressing it at this stage. The same may be considered at the time of final stage of the suit in accordance with law. But, cross-examination of defendant No.3 is yet to be conducted by the parties, therefore, the plaintiff be permitted to cross-examine the defendant No.3 after the cross-examination by the defendants No.1 and 2.

7. The learned counsel for the defendant No.3 as well as defendant Nos. 1 and 2 submits that the procedure earlier adopted with regard to the cross-examination of DW-1 and DW-2 be followed in the same manner. It is also submitted that earlier no such objection was raised by the plaintiff. Defendant No.3 has also denied the contentions raised by the plaintiff. According to them there is no force in the submission of the plaintiff.

8. Mr. Vashisht has referred the decisions of Gujarat High Court in the case of [Shah Hiralal Himatlal and Others Vs. M.G. Pathak and Others](#), and by Andhra Pradesh High Court in the case of [M. Hymavathi and Another Vs. M. Koteswararao and](#)

Others,

In the case of Shah Hiralal Himatlal (supra), the judgment is passed by the learned Single Judge of the Gujarat High Court way back in 1964, wherein it has been held as under:

(4) So far as the defendants go, the question which of the defendants should begin has not been dealt with in Order 18, Civil Procedure Code. But on general principle, if any of the defendants supports the plaintiff in whole or in part, then he should address the Court and lead his evidence first before the other defendants who do not support wholly or in part the plaintiff's case. The order in which defendants lead evidence becomes important only when some of them support the case of the plaintiffs in whole or in part while the others do not. If all the defendants completely oppose the plaintiff's case, then the question of order of leading evidence amongst the defendants is immaterial. It is only when the defendants are divided into two groups, one group consisting of the defendants, who do not support of the plaintiff's case in any part that the question of order of leading evidence becomes important. In such cases among defendants the order of leading evidence should be as follows:

(1) Those defendants who fully support the case of the plaintiff.

(2) Those defendants who partly support the case of the plaintiff.

(3) Those defendants who do not support the case of the plaintiff in any part.

9. In the case of MRs. Sarabjit Singh Vs. Mr Gurinder Singh Sandhu & Bros.; ILR (2011) I Delhi 624, this Court has taken the similar view as argued by the learned counsel, appearing on behalf of the plaintiff. Paras 11 and 12 of the said judgment are as under:

11. I have gone through the aforesaid three authorities and I find myself to be in agreement with the reasoning given by the Bombay High Court as well as the Gujarat High Court, so far as the order in which the cross examination of the plaintiff's witnesses is to be conducted. The reasons for such an order is not far to seek. The Hiralal's case has rightly classified the defendants into three categories-firstly those who are supporting the case of the plaintiff fully, secondly those who are partially supporting the case of the plaintiff and thirdly those who are not at all supporting the case of the plaintiff. The classification of the defendants in the aforesaid three categories must regulate the cross examination of the plaintiff's witness. It may be pertinent here to mention that Section 137 of the Evidence Act also lays down that when a witness enters into a witness box, he will be first subjected to examination-in-chief, then cross examination and thereafter re-examination.

12. The Evidence Act clearly lays down that the scope of cross examination is much wider as it permits a party to cross- examine the witness even regarding his

character in order to impeach his credibility. Leading questions which are suggestive of answer can also be asked to the witness. Therefore, in such a contingency where the scope of cross examination is much wider and gives better leeway to the defendant, it cannot be permitted by a party who either fully or partially supports the case of the plaintiff to cross examine witness after the contesting party has done. If this is permitted to be done, then it will greatly prejudice the rights of the parties who are contesting the claim of the plaintiff. I therefore, find myself in agreement with the judgment of Hiralal's case that the party which supports the case of the plaintiff partially or fully must cross examine the witness of the plaintiff first. Accordingly, so far as the facts of the present case are concerned, the defendants No.3 and 4 are supporting the case of the plaintiff both partially and fully respectively and therefore, they must first cross examine the witness of the plaintiff first rather than the defendant No.1 who is contesting the claim of the plaintiff. I accordingly allow the contention of the defendant No.1 directing defendant No.3 and other defendants to cross examine the plaintiff's witness in the first instance before the defendant No.1 undertakes the cross examination. However, expression of any opinion hereinbefore shall not be deemed to be an express on the merits of the case.

10. Without expressing any opinion on merit and in view of facts and circumstances in the present case, prayer made in the application is allowed. Let the plaintiff cross examine DW-3 after the cross-examination of defendant Nos. 1 and 2 as after small hearing, learned counsel appearing on behalf of defendant No.3 has no objection in case, Court passes the order. However, it is made clear that the objection raised by defendant Nos. 1 and 2 in this regard would also be considered at the final hearing of the suit.

11. The application is disposed of.

CS(OS) No.416/2004

List the matter before the Joint Registrar on 09.07.2012 for further proceedings.