

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 20.07.2020

CORAM :

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.R.P.(PD)No.2182 of 2019
&C.M.P.No.2182 of 2019

1.G.Balaji

2.Venkateswara Rao ... Petitioners

Vs

Saravanasamy ... Respondent

Prayer : Civil Revision petition filed under Article 227 of the Constitution of India to set aside the order dated 27.03.2019 made in I.A.No.155 of 2019 in O.S.No.616 of 2013 on the file of Additional District Munsif Court, Alandur.

For Petitioners : Mr.Ar.L.Sundaresan, Senior counsel
for
Mr.R.Asokan

For Respondents : Mr.M.Thangadurai

ORDER

This Civil Revision Petition is directed against the order passed by the Trial Court dismissing the petition filed for eschewing the evidence of a witness for not submitting himself for continuation of cross-examination

2. Defendant is the Revision Petitioner. Respondent/Plaintiff in this revision filed a suit for permanent injunction in the year 2013. The suit was dismissed for default and restored on application filed by him in the year 2017. During trial the plaintiff examined himself as P.W.1. On 26.10.2017 the plaintiff filed a proof affidavit and the matter was posted for marking documents on 09.11.2017. On three occasions, subsequent to that, he was absent and on two occasions he was present but the matter was adjourned. At last on 05.02.2018, Ex.A1- A6 were marked and for marking of other documents it was adjourned to 22.02.2018. Again for next three hearings P.W.1 was absent and on 27.06.201, as per endorsement made, it was closed for marking of documents and the matter was posted for cross-examination on 03.07.2018. But P.W.1 was not present and the hearing was adjourned to 06.07.2018, on which day, P.W.1 was cross examined in part and adjourned for further cross continuation. The matter was adjourned to 23.07.2018, 11.08.2018, 29.08.2018 on which dates he was called absent. Again on 07.09.2018, cross- examination was conducted in part and adjourned for continuation of cross-examination on 19.09.2018. The witness absented himself on 19.09.2018, 03.10.2018, 09.10.2018, 31.10.2018, 08.11.2018, 21.11.2018 and 04.12.2018. On 04.12.2018, the evidence of P.W.1 was closed and the suit was posted for further evidence of plaintiff side witnesses on

13.12.2018 and adjourned as a last chance on 18.12.2018. It is pertinent to note that on all hearings, counsel for both sides were present.

3. The petitioner filed a petition on 18.12.2018 for eschewing the evidence of P.W.1 as he was not subjecting himself for cross examination on several occasions and evaded to answer questions by cross-examination. The Trial Court dismissed the petition on the ground that the witness was present on two hearing and cross examination was made and hence presumption is available u/s. 114 of Evidence Act. Therefore, dismissed the petition as it is not necessary to reject the above evidence observing that the petition has been filed with an intention to drag on the proceedings.

4. The learned Senior counsel relied on two judgment of this Hon'ble Court reported in MANU/TN/3189/2010 and CRP(PD) (MD) No.1132 of 217 in Rajendran Vs A.Swaminathan dated 1.12.2010 and Antony Matilda vs. Vairamuthu in C.R.P.(PD) (MD) No.1132/2017 dated 08.09.2017 for the proposition that when the opponent was not given the opportunity to cross examine the proof witness or when the witness avoids cross examination, the evidence of such witness shall not remain on record and contended that the plaintiff on several occasions absented himself for cross examination and failed

to subject himself for cross-examination and hence his evidence shall not be retained on record. If any witness, who merely file a proof affidavit and refuses to subject himself for cross examination, his evidence shall be eschewed, otherwise the spirit of adversarial system of law will become meaningless. He would further submit that it will set a bad precedent and truth cannot be elicited through cross examination from any witness. According to him in the instant case, the plaintiff as P.W.1 absented himself for about 15 hearings and on all hearings defendant was ready to cross examine him. Whereas the trial court contrary to the facts observed that the petition has been filed by the defendant with an intention to drag on the proceedings. In fact delaying tactics was adopted by the plaintiff and his evidence shall not remain on record. More so, when further witnesses were examined without any attempt to recall PW1 for continuation of cross. Therefore, he prays the court to set aside the order passed by the Trial Court as not sustainable and perverse.

5. Per contra, the learned counsel for respondent/plaintiff would vehemently contend that as long as the witness was elaborately cross examined on two occasions, it is not necessary to eschew the entire evidence. It's probative value can be looked into at the time of final hearing. To buttress his arguments he would rely on the judgments reported in AIR 1999 SC 1441,

Vidhyadhar vs. Manikrao; 2009(4) TLNJ 217 (Civil), D.F.Philips vs. Damayanthi Kailasam and Others; 2016 (4) CTC 158, Thomas and another vs. Thiagarajan; 2018 (3) TLNJ 717 (Civil), G.Saminathan vs. Kalimuthu and others.

6. I have heard the submissions. Facts narrated above are not disputed.

7. Admittedly, the plaintiff had examined himself as P.W.1 and appeared for cross examination on two occasions that too after the Court issued orders for his appearance. Thereafter he failed to show for further cross examination. In fact, same was the case even for marking the document during chief examination. He appeared for hearing to file his proof affidavit on occasion and absented himself for three successive hearings for marking the documents. Later on one occasion he marked six documents viz A1-A6 and thereafter remained absent and did not mark even the remaining plaint documents.

8. Whether the evidence of a witness, who failed to submit himself for cross examination, shall be rejected or not is the moot question in the present case.

9. From the perusal of adjudications of the Trial Court placed before this Court, reveals that after cross examination in part on 07.09.2018, the case was adjourned for continuation of cross examination on six occasions. On all these hearings, in spite of the direction to be present, the witness failed to appear before the Court. Unless there is necessity for cross examination, the case would not have been adjourned several times. Even assuming that the elaborate cross examination was made, the evidence should have been closed on that date itself. Nobody can presume that there will not be any surprise element till closing of the evidence. Surprisingly admissions as to facts may pop up even at the end of the examination of witness.

10. The Hon'ble Supreme Court in the judgment of Vidhyadhar vs. Manikrao, AIR 1999 SC 1441 has categorically observed that:

“16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai

Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.”

The above ratio was followed by this Court in 2016 (4) CTC 158, Thomas and another vs. Thiagarajan. Hon'ble Mr.Justice S.S. Sundar, relying on the judgment of this Court in D.F.Philips vs. Dhamayanthi Kailasam and Others, 2009 (4) TLNJ 217 (Civil) granted permission permitted to depose further as defendant side witness.

11. In the judgment of D.F.Philips, Hon'ble Mr.Justice K.K.Sasidharan as he then was observed as follows:

“26. In ordinary circumstances, evidence not tested by cross examination has no probative value. There should be an opportunity to the opposite party to cross examine the witness. Things would be different in case the opportunity to cross examine was not availed of by the opposite party. Evidence of a

witness given in chief without subjecting such evidence for cross examination on account of death of the witness is also permissible. However, its probative value would be very little.

27. Similarly, question would arise as in the subject case, about the evidence receded inconclusive. The evidence recorded in cases where cross examination was not done completely cannot be discarded altogether. It all depends upon case to case and no uniform rule of general application could be made in such matters. In cases wherein cross examination was practically completed and the witness was not in a position to subject himself for further cross examination on account of illness or otherwise, or on account of other justifiable reasons, the probative value of such evidence has to be considered by the Court. Section 33 of the Evidence Act permits the evidence given by a witness in a judicial proceeding or a later stage of the very same judicial proceeding, the truth of the facts which was elicited during such examination, when the witness was dead or cannot be found or was incapable of giving evidence or in case the witness was kept out of the way by the adverse party. However, the proviso to the said Section also provides that the adverse party in the first proceeding must have the right and opportunity to cross examine him so as to use the evidence so tendered in the subsequent proceeding or in later stage of the same proceeding. Therefore, everything depends upon the peculiar facts of the said case. If the failure to face the further cross examination was involuntary, it stands in a different footing.

28. There is no provision for eschewing the incomplete evidence of a witness. The evidentiary value or probative value of such evidence is a matter to be considered by the trial Court. Situations would arise where on account of the less favourable answers given in the initial stage of cross examination, the witness may avoid the box on subsequent occasions. In such circumstances, the trial Court is justified in forming an opinion about the probative value of such evidence in the peculiar factual background. In all cases where there was no deliberate attempt on the part of the witness to avoid cross examination, evidence would be admissible but its probative value is a matter to be decided by the trial Court. Merely by avoiding further cross examination, it cannot be said that the entire evidence has to be eschewed from consideration. It is always possible for the Court to examine all the surrounding circumstances leading to the avoidance of further cross examination and to come to a definite conclusion as to whether it was deliberate act on the part of the witness.”

9. All the above cases pertain to incomplete evidence of a defendant's witness. Naturally, the defendant puts down his defense by way of written statement either denying averments made in the plaint as a whole or admitting to certain facts generally or specifically. He lets in evidence to disprove the case projected by the plaintiff and the evidentiary value of the plaint documents. When he underwent cross examination to a considerable extent, but

could not complete the same due to certain unavoidable circumstances, Courts cannot reject entire evidence, but shall take into consideration its probative value, while deciding the case, more so, when the plaintiff evades or avoids and deliberately delays completion of evidence. On the other hand, a case projected by the plaintiff, shall be based on introduction of facts through plaintiff averments, supported by oral and documentary evidence. It can be controverted only through cross examination and the veracity of the evidence can be tested by other side. Plaintiff being Dominus litis spearheads the litigation. Onus is more on him to prove the case, unless the burden is shifted to opposite side. In that process he must be ready and prepared and show that he is always available and willing to complete the evidence. In spite of his readiness, if it is shown that the cross examination was avoided or delayed at the instance of the opposite party, in such circumstances, probative value of the available evidence would be taken into consideration.

10. It is imperative to analyse as to whether such a situation prevailed in the instant case to apply the above ratio.

11. In any suit, subject to exceptions, Plaintiff being the Dominus litis is bound to prove his case, as observed supra. Particularly in a suit for injunction,

material evidence, major portion of which, in all probabilities, fall within the personal knowledge of the plaintiff, which plays a predominant role. All other witnesses would corroborate the case of the plaintiff. The evidence of the Plaintiff, as such is very crucial to prove his case. Such evidence shall be complete and it becomes complete only upon completion of cross examination by other side. Holding the precedents and the ratio at the back of the mind, the conduct of the Plaintiff, if seen, admittedly, the materials placed before the court shows that the suit was restored on file after it having been dismissed for default. After having filed the proof affidavit, the Plaintiff had taken his own time to mark the documents. He absented himself for three hearings before marking Exhibits A1- A6 and had taken time to mark further documents, but could not do so, for want of his appearance before the court for three consecutive hearings. An endorsement was by the counsel on his behalf and in his absence that no further marking of documents. The matter was posted for Cross Examination on 03.07.2018 and adjourned due to his non appearance to 06.07.2018 and he was cross examined in part. Again he was absent for three consecutive hearings and cross examined further on 07.09.2018 in part and the matter was adjourned for further cross examination. Again he absented himself for eight consecutive hearings viz., 19.09.2018, 03.10.2018, 09.10.2018, 31.10.2018, 08.11.2018, 21.11.2018 and 04.12.2018. Since he did not appear

PW1 evidence was closed. It is pertinent to note that on all hearings counsel for both sides were present and participated in proceedings.

12. The above conduct of the Plaintiff, after having filed the proof affidavit and marked the documents, remaining absent for cross examination will amount to denial of opportunity to the opponent to disprove the claim and render the evidence as complete one. As held by this Court in Rajendran's case as well as Metilda's (supra) incomplete evidence of a witness who has failed to subject himself for cross examination shall not be retained on record. Even though there is no provision to eschew the evidence, the evidence of the Plaintiff in the above case, not tested by cross examination on account of his non appearance, does not even have the probative value, for, the incompleteness is attributable to the Plaintiff himself. The further contention of the respondent that the evidence can be used at the later stage of the proceeding as per Sec.33 of Evidence Act is also not sustainable for the reason the evidence herein is not the complete evidence in the eyes of law. As contended by the learned Senior Counsel for the petitioner, if a witness is allowed to avoid the witness box for cross examination after letting in evidence in chief examination his evidence cannot be retained on record and does not merit consideration. If such an evidence of a defaulting, delaying, clever or crooked

and cunning witnesses is taken for consideration, it will run against the spirit of adversarial system of law. Thus, the plaintiff in the instant case, who could not appear before the court on the ground that his employer refused to grant leave for months and in fact years together, is not entitled to any equitable treatment and his evidence cannot be retained for considering its probative value. Even though it is countered by the respondent/Plaintiff that extensive cross examination has been done, it is relevant to note that the learned judge has not chosen to consider or accept the same and has not observed as such. If it is true that extensive cross examination has already been made, the matter need not have been adjourned for about seven hearings for continuation of cross examination.

13. Further it is submitted by the counsel appearing for both sides that after closing the evidence of PW1, Plaintiff's side evidence has been continued and as of now PW 3 examination itself is over. Had the Plaintiff been keen to complete his evidence, he would have offered himself for cross examination by re-opening and recalling his evidence. The conduct of his clearly shows that he was and is not very keen in doing so. In such an event the incomplete evidence of the Plaintiff shall not remain on record and it shall be eschewed. In that view of the matter the order of the court below in dismissing the petition for

eschewing the evidence is not sustainable.

14. In view of the discussions made above the order passed in I.A.No.155 of 2019 in O.S.No.616 of 2013 dated 27.03.2019 on the file of Additional District Munsif Court, Alandur stands set aside. The incomplete evidence of P.W.1 cannot remain on record and accordingly eschewed. In the result, the Civil Revision Petition is allowed. No costs. Connected miscellaneous petition is closed.

20.07.2020

Index : Yes / No
Internet : Yes / No
Speaking/ Non Speaking Order

To
The Judge,
Additional District Munsif Court, Alandur.

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M.GOVINDARAJ, J.

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