

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

C.R.P.(P.D).No.1786 of 2015
and M.P.No.1 of 2015

1.Sachithanantham
2.Sridhar
3.Anandan

...Petitioners

Vs

1.Krishnan
2.Kasi

...Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair order and decreetal order dated 16.02.2015 made in I.A.No.108 of 2015 in O.S.No.160 of 2012 on the file of the District Munsif Court, Palacode.

For Petitioners : Mr.R.Rajaramani

For Respondents : Mr.A.Ilayaperumal for R1
for R2- NDW

ORDER

This Civil Revision Petition is directed as against the fair order and decreetal order dated 16.02.2015 made in I.A.No.108 of 2015 in O.S.No.160 of 2012 on the file of the District Munsif Court, Palacode,

thereby dismissing the petition filed by the petitioners herein to recall the D.W.2 for cross examination.

2.The petitioners are defendants 11 to 13 in the suit filed by the 1st respondent herein. The suit is for partition. During trial, the petitioners have examined D.W's.1 and 2. The D.W.2 deposed in chief that the suit property was partitioned and he knows about the shares allotted to the parties and its measurements by the sale deed dated 18.07.2011. But, during cross examination he deposed that he does not know about the sale deed which was produced before the trial Court and also he does not know to read and write. Since the D.W.2 turned hostile, the petitioners filed a petition to recall the D.W.2 to declare him as hostile and permit them to cross examine D.W.2, under Section 154 of the Evidence Act.

3.The learned counsel for the petitioners would submit that the D.W.2 was examined by the petitioners herein. During cross examination he turned hostile and deposed that he does not know about the sale deed and also he does not know to read and write. Unfortunately, the petitioners failed to cross examine him at the time itself, since he turned hostile. Therefore, he filed the petition to recall the D.W.2 to cross examine him in

I.A.No.108 of 2015. The Court below dismissed the petition only for the reason that immediately after examination of D.W.2, he was not declared as hostile and failed to seek permission to cross examine him. Therefore, the trial Court dismissed the same. He further submitted that at any stage, the witness can be recalled for cross examination and that too when the witness turned hostile under Section 154 of the Indian Evidence Act, the party can be permitted to cross examine the witness. In support of his contention he relied upon the case of *S.Bhaskaran and another Vs. R.Loganathan (deceased) and anohter* reported in *2014 (1) CTC 440* and the order passed by this Court in C.R.P.(PD)(MD).No.460 of 2014 dated 06.07.2015.

4.Per contra the learned counsel for the 1st respondent would submit that the petitioners failed to cross examine on the date of examination of D.W.2, when he turned hostile. After cross examination of P.W's.3 and 4 only to fill up the lacunae, the petitioners filed the petition that too only to recall the D.W.2. First of all, the petitioners ought to have filed the petition seeking permission to declare the D.W.2 as hostile witness and thereafter he has to file a petition for cross examination. In support of his contention he relied upon the case of *K.K.Velusamy Vs. N.Palanisamy*

reported in **2011 (3) CTC 422**.

5.Heard the learned counsel for the petitioners and the learned counsel for the 1st respondent and also perused the materials available on record.

6.The petitioners are defendants 11 to 13 in the suit filed by the 1st respondent herein for partition. During the trial, the petitioners have examined D.W.2, in support of their case. While cross examination of D.W.2, he turned hostile. Thereafter the petitioners have cross examined D.W.3 and 4 and after a period of 2 ½ months they filed a petition to recall D.W.2 for the reason that he turned hostile and as such under Section 155 of the Indian Evidence Act, they sought for cross examination of D.W.2.

7.The trial Court dismissed the same only for the reason that the petitioners did not file the petition immediately after examination of D.W.2. In this regard, the learned counsel for the petitioners relied upon the Judgment of this Court reported in **2014 (1) CTC 440** in the case of **S.Bhaskaran and another Vs. R.Loganathan and others**. Relevant paragraphs are extracted hereunder:-

"18.But, under certain circumstances, it may

require the party, who has called the witness also to cross examine his witness. To meet such a situation, Section 154 has been inserted in the Evidence Act. The common illustration is, when the witness turned hostile, resiled from his statement given already in favour of the party, who had called him to depose or when the witness is not supporting the case of the party, who had called him or such a witness became inimical to him.

19.What is important is that the truth of the matter has to be extracted/placed before the Court. This is also done through the oral evidence of the witness before the Court. Arriving at the truth of the matter is the essential function of the Court. Truth of the matter may be unravelled at any stage of the case. Such a function cannot be curtailed by any stage or period.

*20.In **Rabindra Kumar Vs. State of Orissa**, AIR 1977 SC 170, with regard to Section 154 of the Evidence Act, the Hon'ble Apex Court held as under:*

"Before proceeding further we might like to state the law on the subject at this stage. Section 154 of the Evidence Act is the only provision under which a party calling its own witnesses may claim permission of the Court to cross-examine them. The Section runs thus:

"The Court may, in its discretion permit the

person, who calls a witness to put any question to him which might be put in cross-examination by the adverse party"

The Section confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles, which may govern the exercise of such discretion. It is however, well settled that the discretion, must be judiciously and properly exercised in the interest of justice. The law on the subject is well settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before the earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One of the glaring instances in which this Court sustained the order of the Court in allowing cross-examination was where the witness resiles from a very material statement regarding the manner in which the accused committed the offence."

This Court has held that the truth of the matter may be unraveled at any stage of the case. Further, claim under Section 154 of the Indian Evidence

Act, is the only provision to claim permission of the Court to cross examine its own witness.

8.In the case on hand, though the petitioner sought for recalling of D.W.2 for the reason that the D.W.2 turned hostile and necessarily the petitioners ought to have cross examine him. Further, Section 154 of the Indian Evidence Act confers a judicial discretion on the Court to permit cross examination the witness and does not contain any conditions or principles, which may govern the exercise of such discretion.

9.The learned counsel for the petitioners also relied upon the Judgment of this Court held in C.R.P.(MD)No.460 of 2014 dated 06.07.2015 and the relevant paragraphs are extracted hereunder:-

"8.The provisions of the Evidence Act would show that the chief-examination of the witness would be conducted by the party, at whose instance, the witness was summoned. Thereafter, he would be cross-examined by the adverse party. Section 154 of the Evidence Act is an exception to the general principle that cross-examination would be conducted only by the adverse party. Section 154 of the Evidence Act therefore gives a discretion to the Trial Court. While exercising discretion, the Court must

be convinced that the evidence tendered by the witness examined by a party on his side shows an element of hostility or that the witness has resiled from his earlier statement in material particulars. The Court is, therefore, given a wide discretion to decide the question of hostility.

THE PRECEDENT:

9.The Supreme Court in Sat Paul V. Delhi Administration [AIR 1976 SC 294] held that grant of permission to treat a witness as hostile is expedient to extract the truth and to do justice. The Supreme Court observed:

"The discretion conferred by S.154 on the Court is unqualified and untrammelled, and is apart from any question of hostility. It is to be liberally exercised whenever the Court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared" "hostile", "declared unfavourable" the

significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts."

10.The Supreme Court in Dahyabhai v. State of Gujaraj [AIR 1964 SC 1563]observed that to confine a portion of Section 154 of the Evidence Act to a particular stage in the examination of a witness is to read words in the section which are not there. The Supreme Court further observed that the Court can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination in chief."

The above Judgment is squarely applicable to the case on hand. In the present case on hand, though the petitioners filed a petition to recall the D.W.2 for cross examination, after a period of 2 ½ months, it cannot be said that the petition was filed to fill up the lacunae. On perusal of evidence of D.W.2, it revealed that he turned hostile. Therefore, the petitioners ought to have requested to invoke Section 154 of Evidence Act, when the witness is in the witness box.

10.The trial Court closed the witness and as such the petitioners necessarily have to file a petition to recall the D.W.2 for cross examination. The trial court should be given the discretion to entertain the application even after closing the evidence, in case proper and sufficient reasons are given for the failure to invoke Section 154 of the Evidence Act, earlier. There cannot be a straight jacket formula in such cases. Therefore, the order passed by the trial Court is perverse and illegal and is liable to be set aside.

11.Accordingly, the order of the trial Court dated 16.02.2015 made in I.A.No.108 of 2015 in O.S.No.160 of 2012 on the file of the District Munsif Court, Palacode, is set aside and the Civil Revision Petition is allowed. No costs. Consequently connected miscellaneous petition is closed.

सत्यमेव जयते

18.01.2021

Index: Yes/No
Internet: Yes/No
Speaking Order: Yes/No
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To
The District Munsif Court, Palacode.

G.K.ILANTHIRAIYAN,J,

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