IN THE HIGH COURT OF KARNATAKA, BENGALURU

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO.14032 OF 2019 (GM-CPC)
DATED : 16-10-2019

RAJIV VIJAYASARATHY RATHNAM VS. SUDHA SEETHARAM,

ORDER

Petitioner being the plaintiff in a bitterly fought money suit in O.S.No.1305/2013 is invoking the writ jurisdiction of this Court for assailing the order dated 15.03.2019, a copy whereof is at Annexure-H, whereby the learned XLI Addl. City Civil Judge, Bengaluru having treated the witnesses i.e., DWs 3 & 4 as 'hostile' has permitted their cross-examination by the defendant who had called them as her own witnesses. The defendant-respondent having entered caveat through her counsel, resisted the writ petition.

2. Brief facts of the case are:

(a) Petitioner-plaintiff happens to be the son-in-law of the defendant-respondent. The suit is for the recovery of INR 26 lakh along with interest; the respondent has filed her Written Statement resisting the suit; on 24.09.2013 the learned trial Judge has framed issues and on 06.04.2016 additional issue also has been framed;

(b) the respondent had filed a private complaint in

PCR No.2116/2016 against the parents of the petitioner in February 2016 alleging siphoning of the money; these criminal proceedings were stayed by this Court in Crl.P.No.3675/2016; later they came to be quashed by the Apex Court in S.L.P(Crl) Diary No.1434/2018, vide Order dated 15.02.2019, *inter alia* holding that the dispute was civil in nature;

(c) respondent's application dated 19.01.2017 filed under Order I Rule 10(2) of C.P.C., 1908 for impleading petitioner's parents as additional defendants to the suit was negatived by the trial Court on 06.10.2018; the respondent being the defendant got examined his GPA Holder Mr.S.K.Seetharamu as DW-1; one Mr.Narayana was examined as DW-2; the request of the respondent for summoning petitioner's parents for examining them as DWs 3 & 4 came to be allowed by the learned trial Judge vide Order dated 18.02.2019; and,

(d) petitioner's mother Dr.S.K.Vasundara Devi was examined as DW-3 and petitioner's father Prof. R.K.Vijayasarathi was examined as DW-4, in chief; the learned trial Judge by the impugned order having treated the said witnesses as hostile has permitted the respondent to cross examine them; grieving against the same, this writ petition is presented.

3. Submission of the petitioner-plaintiff:

(a) learned Sr. Advocate for the petitioner Shri Jaykumar S.Patil banking upon a decision of this Court in the case of SHIVAMURTY SWAMY vs. AGODI SONGANNO, AIR 1969 KAR 12 argues that although in an appropriate case even the Civil Court can treat the witnesses of the parties as hostile and permit them to be cross examined, the learned trial Judge is not justified in treating DWs 3 & 4 as hostile and thereby permitting their cross examination inasmuch as the respondent knew the hostility of the said witnesses qua the petitioner because of the criminal case mentioned above; once having examined them as witnesses from her side, the respondent could not have turned around and sought for treating them as hostile so that she could cross examine them;

(b) a party to the suit chooses certain persons to be his witnesses presumably for supporting his version of the case; however, at times the truth trickles out adverse to the interest of such party when his witnesses depose; that *per se* does not justify in treating the said witnesses as hostile; in other words, more is required to show the hostility so that cross examination by the party calling his witness may be permitted for eliciting the truth; and,

(c) the learned trial Judge is not justified in holding that the petitioner does not have say in the matter of treating a witness to be hostile and that it is purely between the court and the party calling the witness on his behalf; the petitioner had legitimate interest in such decision by the trial Court inasmuch as such a decision has a bearing on his stand in the suit; thus the impugned order is violative of principle of natural justice namely *audi alterem partem.*

4. Submission of the respondent-defendant:

(a) the learned counsel for the respondent Mr.R. Abhinav, relying upon the decision of the Apex Court in the case of GURA SINGH vs. STATE OF RAJASTHAN, (2001) 2 SCC 205, per contra contends that it is always open to a party to the suit to call any person as his witness; if such witness *prima facie* shows hostility during the course of examination in chief, with the oblique motive of prejudicing the interest of the party calling him, the trial Judge in his discretion and wisdom can accede to the request for treating such witness as hostile and thereby permit the party to cross examine him for the purpose of eliciting the truth or for impeaching his adverse deposition;

(b) the Apex Court interpreting the provisions of Sec.154 & 155 of the Indian Evidence Act, 1872 has held that the limitations obtaining in *pari materia* English Law of Evidence in the matter of treating the witnesses as hostile are conspicuously absent in Indian Law of Evidence and therefore the impugned order being a product of due exercise of discretion by the learned trial Judge does not warrant indulgence at the hands of Writ Court; and,

(c) even otherwise, law is well settled as to how the deposition of hostile witness is to be treated, no prejudice as such has been occasioned by the impugned order to the petitioner and therefore regardless of arguable irregularity therein, this Court should not interfere in the matter since the request for interference is preposterous.

5. Having heard the Learned counsel for the parties and having perused the petition papers, no reprieve can be granted to the petitioner because:

(i) in India the law relating to hostile witness is broadly delineated by the statutory provisions as interpreted by several High Courts; Section 154 of the

Indian Evidence Act, 1872 provides for putting of questions by a party to his own witness; this section reads as under:

> *"S.154. Question by party to his own witness-*
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> *(1) The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.*
>
> *(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness."*

This provision allows a party to the proceeding, civil or criminal, to put questions to his own witness in the same way as the adverse party would do in cross-examination, of course with the permission of the Court; such a witness can be asked leading questions (section 143), questions relating to his previous statements in writing (section 145) and questions which tend to test his veracity to discover who he is and what his standing in life is or to impeach his credit (section 146). However, under the English Law of Evidence, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character or shady antecedents such as previous conviction or the like; in India, this can be done with the permission of the Court under section 155 of the Act which reads as under:

"S.155. Impeaching credit of witness: The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:-

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has [accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

(ii) As already mentioned above, section 154 permits a party to put questions to his own witness and these questions might be those that can be put in cross-examination by the adverse party; however, it does not necessarily tantamount to 'cross-examining' the witness, *stricto sensu*; cross-examination means the cross-examination which the adverse party as distinct from the party calling the witness (section 137) does; therefore, neither the party calling him nor the adverse party is, in law, precluded from relying on any part of the statement of such a witness vide PROFULLA KUMAR SARKAR vs. EMPEROR, AIR 1931 Calcutta 401.

(iii) The terms 'hostile', 'adverse', 'unfavourable' or 'unwilling' witnesses are not employed in the Indian Evidence Act, 1872 by the draftsman in view of conflicting judicial opinions in England as to the true meaning of these words; it is a settled principle of law that ordinarily a party calling his witness is not allowed to cross examine him as if such party is an adversary in the proceedings; however, sections 154 & 155 are in the nature of an exception of this general rule; these sections are founded on the wisdom gained from long experience of the learned; these sections provide for relaxation of the general rule so that by the cross examination of the hostile witness truth is extracted; it is now well established that the scope of section 154 is not limited to putting leading questions, but extends to the whole range of cross examination.

(iv) A party will not be normally allowed to put leading questions (to cross examine) his own witness save by the permission granted by the court in its discretion; it is true that the discretion means according to rules of reason & justice; the exercise of discretion depends upon the facts and circumstances of each case; before a Court declares a witness hostile and grants permission to the party to cross examine his own witness, there must be

some material to show that the witness has gone back from his earlier statement unjustifiably, or is not speaking the truth deliberately, or has exhibited an element of hostility, or has changed sides *prima facie;* the demeanor of the witness in the box may also be one of the relevant factors; the Court recording the evidence has to employ sound common sense and prudence while exercising the discretion; it is needless to mention that permission to treat the witness as hostile witness cannot be granted for mere askance.

(v) The argument of Mr.Patil that the respondent from the beginning knew of the hostility between the parents of the petitioner and herself, there being the criminal case fought upto the level of highest court of the country and despite this he chose to examine the parents as his witnesses and therefore the court ought not to have granted permission to treat them as hostile witnesses is bit difficult to countenance; there was hostility between the parties is undeniable and as also between the respondent and parents of the petitioner; that *per se* could not avail for invalidating the impugned order; what Taylor an authority on the English Law of Evidence states hereunder equally applies to Indian law too:

> *"The judge in his discretion, will sometimes allow leading question to be put in a direct examination: as for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him or interested for the other party, or unwilling to give evidence or where special circumstances render the witness rather the witness of the court than of the party. Where a litigant is called as a witness by the opposite party the latter is not entitled as matter of right to cross examine him as a hostile witness".*
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> (Halsburys Laws of England Vol.15
> 3rd Edition, paras 805-806)

Here again, the trial Judge has to be cautious because a shrewd and composed witness might, by concealing his real sentiments or hostile attitude give unfavourble evidence contrary to the facts known to him and what the party calling him expected.

(vi) Aiyar & Aiyar in their "ART OF CROSS EXAMINATION" 10th Edition, LexisNexis at page 1381 write as under:

> "*Merely giving unfavourable testimony cannot also be enough to declare a witness to be hostile, for he might be telling the truth which goes against the party calling him expected him to say. He is hostile if he tries to injure the party's case by prevaricating or suppressing the truth. The court has by this section been given a very wide discretion and is at liberty to allow a party to cross-examine his witness: (i) when his temper, attitude, demeanour and bearing in the witness-box show a distinctly antagonistic feeling or a mind hostile to the party calling him, or (ii) when concealing his true sentiments he*

does not exhibit any hostile feeling, but makes statements contrary to what he knew and was called to prove or what he had deliberately told before and by his manner of giving evidence and conduct shows that he is suppressing the truth, or that he is not desirous of giving evidence fairly and telling the truth to the court with a view to help the other party. Whether he shows himself so hostile as to justify his cross-examination by the party calling him, is a matter entirely for the discretion of the judge. A witness is not necessarily hostile if in speaking the truth his testimony happens to go against the party calling him and the fact that he has become hostile has to be established by eliciting information such as could give an indication of hostility ".

(vii) A Co-ordinate Bench of this Court in the case of SHIVMURTHY SWAMY (*supra)* at paras 16, 17 & 18 observed as under:

"16. In normal case where it can be fairly assumed that a party calling a witness represents to the Court that he is a trustworthy witness, an occasion for the party calling him to seek permission under Section 154 of the Evidence Act can arise only where he unexpectedly gives an answer which is adverse to his case. Even there, it is not enough if the party feels that the witness is hostile to him; it is necessary that the Court should come to entertain an opinion that the witness has such hostile animus against the party calling him as to be inspired by a desire to speak the untruth or not to speak the truth.

17. Hence, in such cases, an element of surprise of the type mentioned above becomes the starting point for a consideration by the Court of the question whether it should exercise its discretion under Section 154 and permit the party calling a witness to cross-examine him.

> *18. It is with reference to such cases that Rowland J., observed in Sachidanand Prasad vs. Emperor MANU/BH/0320/1933, that permission under Section 154 could hardly be refused when any witnesses makes an unexpected statement adverse to the case of the prosecution. As I read the observation, it means that an attempt on the part of the witness to depart from what is tentatively believed to be true is open to the suspicion that he may be departing from the truth, making it necessary to test his veracity by cross-examination by the party to whose detriment his unexpected departure may operate*".

These observations cannot be construed as laying down any axioms of law on the point; they are more in the nature of indicators or handposts to the traveler; however, they are not decisive, either, in adjudging the validity of permission or its denial for treating a witness as hostile.

(viii) The decision in GURA SINGH (*supra*) was rendered in a criminal appeal; the Apex Court mentioned about the difference between the Indian Evidence Act, 1872 and the English Act of 1865 so far as it related to hostile witnesses; it has been specifically stated therein that unlike in English Law, there are no fetters in Indian Law in treating a witness as a hostile witness and thereby enable the party to cross-examine him, as rightly pointed out by Mr.R.Abhinav, the learned counsel for the respondent. Again the observations of the Court at para

13 therein which learned Sr. Advocate Mr.Patil banked upon do not much advance his case; the Court deprecated the manner in which the prayer was made by the Public Prosecutor and of the permission granted by the learned trial Judge to cross-examine PW-2 allegedly on the ground of his being hostile, in the absence of any elements of hostility; however, in the present writ petition, there are factors which justify treating the subject witnesses as hostile and this makes all the difference to the case; what the Apex Court did in a case is not much relevant unlike what declaration of law it has made under Article 141 of the Constitution of India.

(ix) The learned trial Judge below has given some reason as to why he accorded permission to the respondent to treat her witnesses namely DWs 3 & 4 as hostile for enabling her to cross-examine them; at para 7 of the impugned order, the learned trial Judge observed as under:

> *"7. As stated above, the DW3 and DW4 are the parents of the plaintiff and in their examination-in-chief they have denied the repayment of Rs.20,00,000/- by the defendant and the defendant is specifically contending in the written statement that at the instance of he plaintiff only the said amount of Rs.20,00,000/- was paid to the parents of the plaintiff with interest. When such being the case, I have find*

considerable force in the submission of the defendant's counsel that DW3 and DW4 being the parents of the plaintiff may depose in order to help their son and hence I am of the opinion that the defendant's counsel has to be permitted to treat the DW3 and DW4 as hostile and permit him to cross-examine them."

These observations being germane to the issue give sustenance to the impugned order.

(x) The above apart, the learned trial Judge has also noted the demeanor of witness DW-3 as well. Therefore it cannot be gainsaid that the impugned order is bereft of reasons. However, it is true that, the petitioner ideally speaking, could have been given an opportunity of hearing in deciding as to whether permission was to be granted for treating the witnesses as hostile; but, the petitioner has been heard by this Court on this aspect of the matter at length and whatever arguable legal infirmity the impugned order has, in not affording an opportunity of hearing is remedied by permitting a lengthy argument in the matter by this court; after all the impugned order perfectly belongs to the class of discretionary orders which this Court will not undertake much deeper examination of, in its extraordinary but limited jurisdiction under Article 227 of the Constitution of India vide TRIMBAK

GANGADHAR TELANGA VS. RAMCHANDRA GANESH BHIDE, AIR 1977 SC 1222.

(xi) There is yet another reason for not granting indulgence in the matter: a party calling a person as a witness is not bound by all the statements made by him; a party is not bound by the evidence of a witness who he produces, and no part of the statement of such witness amounts to an admission on behalf of the party calling him; there is no rule of law that a party is not able to say that a witness produced by him is not speaking the truth upon some particular point. The refusal by the Court to allow a witness to be cross-examined as hostile does not necessarily imply that it considers him to be a truthful witness. Similarly the granting of permission does not amount to a declaration that his evidence is unworthy or unreliable in toto (EMPEROR vs. HARADHAN, AIR 1933 PATNA 517); it is for the court to go through the entire evidence of such witness and determine what part of such evidence is acceptable; Rankin C.J of the Full Bench of Calcutta High Court in Profulla Kumar Sarkar (supra) observed:

> *"In my opinion the fact that a witness is dealt with under s.154 Evidence Act, even when under that section he is cross-examined to*

credit, in no way warrants a discretion to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence. There is, moreover, no rule of law that if a jury thinks that if a witness has been discredited on one point that they may not give credit to him on another."

(xii) Rupert Cross an acclaimed English jurist in his treatise "Evidence", 3rd Edition, London-Butterworths 1961 opines at pages 206 & 207 as under:

"*the Judge may allow the examination-in-chief of a hostile witness to be conducted in the manner of a cross-examination to the extent to which he considers it necessary for the purpose of dong justice. The witness may be asked leading questions with regard to his means of knowledge of the facts to which he is deposing or tested on such matters as the accuracy of his memory and perception……..there seems to be no doubt that, in deciding whether to allow the witness to be treated as hostile, the Judge may have regard to the witnesses demeanor, the terms of any inconsistent statement and the circumstances in which it was made. As the matter is dependent on judicial discretion, the Judges decision will seldom be reversed by an appellate tribunal.*"

Thus, the impugned order being a product of exercise of wide discretion by the learned trial Judge, this court consistent with the opinion of the above jurist, declines to undertake a deeper scrutiny of the same.

In the above circumstances, this writ petition being devoid of merits, is rejected.

Costs made easy.