

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INDIAN EVIDENCE ACT, 1872

CM(M) 374/2008 with CM Nos. 4286/2008 and 13305/2008

Reserved on : March 04, 2009

Date of Decision : March 17th, 2009

POONAM CHAWLA

..... Petitioner
Through Mr. C.M. Oberoi with Mr. K.R. Chawla and
Mr. Kirti Uppal, Advocates

versus

NIRANJAN KUMAR

..... Respondent
Through Mr. Valmiki Mehta, Senior Advocate with Mr.
Pragyan P. Sharma and Mr. Girish K. Kaul,
Advocates

MANMOHAN, J

1. Present petition has been filed under Article 227 of the Constitution of India seeking to set aside order dated 7th March, 2008 passed by Additional District Judge in Suit No. 537/2007 whereby respondent/defendant's application under Section 73 of Indian Evidence Act, 1872 (hereinafter referred to as 'IE Act') was allowed.

2. Briefly stated, the material facts of this case are, that on 25th July, 2005 defence of respondent/defendant had been struck off. Respondent/defendant's application for recalling the said order was dismissed on 13th September, 2005. A civil miscellaneous main petition being CM(M) No. 2545/2005 filed by respondent/defendant against said order was also dismissed by this Court on 24th October, 2005. Even a Special Leave Petition being SLP(C) No. 25073/2005 filed by respondent/defendant against said order was dismissed by Hon'ble Supreme Court on 31st July, 2006. Consequently, the order striking off defendant/respondent's defence has attained finality.

3. When trial court disallowed respondent/defendant from confronting petitioner/plaintiff's witness with certain rent receipts purportedly issued by previous owner Col. B.S. Gaiind, respondent/defendant filed CM(M) No. 3167/2005 in this Court and the said petition was disposed of by this Court by observing that there was nothing which precluded respondent/defendant from confronting petitioner/plaintiff's witness in cross-examination with documents which are not on record. This Court observed, "there is no dispute about the proposition of law that if the witness denies those documents, then those documents certainly cannot be exhibited and the occasion to exhibit those documents would only arise if the witness admits those documents. This is so since in

cross examination, opposite party has a right to practically pull out a document out of its pocket and confront the witness with that document, which relates to that witness.....”

4. Pursuant to said order, respondent/defendant availed of the opportunity to cross-examine petitioner/plaintiff’s witness. The said witness was confronted with various documents. One document was admitted and exhibited, however other documents were denied and those were not exhibited. Thereafter, suit was fixed for final hearing.

5. It was at that stage respondent/defendant filed an application under Section 73 of IE Act read with Section 151 of Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) and made a prayer that his application be decided prior to final hearing of suit. In CM(M) No. 1246/2007 this Court ordered that respondent/defendant’s application should precede the final decision of main petition.

6. By the impugned order dated 7th March, 2008 trial court allowed respondent/defendant’s application under Section 73 of IE Act. The relevant portion of impugned order is reproduced hereinbelow for ready reference :-

“I have gone through the relevant material. So far as the contention that Defendant could not have been allowed even to put suggestions in support of his defence, to the witness of Plaintiff nor was entitled to confront rent receipts to him are concerned the same cannot be raked up as the point in contention was decided by the Hon’ble High Court on 18.11.06 by a consent order. Simultaneously it needs to be observed that the veracity of the deposition of PW 2 cannot be assessed at this stage lest it would tantamount to prejudging the evidence.

It would be exaggerated to contend that by comparing the signatures of a litigant with the aid of expert report, the court would be venturing to create evidence in favour of a party. If that were the interpretation to be adopted, the purpose of enacting section 73 in the Evidence Act would be rendered nugatory. The anxiety of Court is that parties have full opportunity to present their case within the confined legal limits and to ensure that handicap of a party may not be exploited by the other.

Detailed appreciation of arguments raised on behalf of the parties is not required at this crucial stage when the suit is already matured. The plaintiff should not feel shy about her position viz a viz the questioned receipts as the purported exercise of comparison of signatures with the help of neutral expert is an attempt only to elicit truth.

In view of the above reasons the application of Defendant is allowed.....”

(emphasis supplied)

7. Mr. C.M. Oberoi, learned Counsel for petitioner submitted that it is well settled that once Respondent/Defendant’s defence has been struck off, it is impermissible for the Respondent/Defendant to directly or indirectly seek to establish or prove defence, or documents which do not form part of evidence and have not been admitted or proved or exhibited. He further submitted that documents which are neither admitted in evidence nor exhibited cannot form part of record and as per mandatory provision of Order 13 Rule 7(2) of CPC, the same are to be returned to the person producing them. He referred to Rule 7(2) of Order 13 of CPC, which reads as under :-

ORDER XIII

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

XXXXXX

XXXXXX

XXXXXX

7. recording of admitted and return or rejected documents

(1).....

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

8. According to Mr. Oberoi, Section 73 of IE Act has no applicability or relevance to the facts and circumstances involved in present case. He submitted that when defence of defendant has been ordered to be struck off, defendant according to well settled principles is not permitted to lead any evidence of his own and can cross-examine plaintiff's witnesses only to a permitted extent. He further submitted that it is not open to respondent/defendant to seek to establish his defence and test the veracity of plaintiff's witnesses. According to him, in allowing the application under Section 73 of IE Act, Additional District Judge has acted in disregard of the law as laid down by the Apex Court in Modula India Vs. Kamakshya Singh Deo reported in (1988) 4 SCC 619.

9. Mr. Valmiki Mehta, learned Senior Counsel for respondent/defendant contended that respondent/defendant's right to confront witnesses of petitioner/plaintiff with disputed rent receipts was no longer res integra in view of above referred observations in CM(M) No. 3167/2005. He stated that examination of rent receipts was required to demonstrate falsity and weakness of petitioner/plaintiff's case. According to him, respondent/defendant has a right to demonstrate that petitioner/plaintiff's witnesses are not speaking the truth. Mr. Mehta submitted that it is the duty of Court in cases where defendant is not able to lead his defence to ensure, that justice is done to parties and plaintiff is given only that much relief, to which plaintiff is entitled to and nothing more just because defendant had lost his right to lead defence. In this context, Mr. Mehta referred to and relied upon following judgments :-

A) Balraj Taneja and Anr. Vs. Sunil Madan and Anr. reported in (1999) 8 SCC 396 wherein it has been held as under:-

“27. In view of the above, it is clear that the Court, at no stage, can act blindly or mechanically.....

29.....the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint.....”

B) Ramesh Chand Ardawatiya Vs. Anil Panjwani reported in (2003) 7 SCC 350 wherein it has been held as under :-

“32. The third and the last submission of the learned senior counsel for the appellant is that even if the suit proceeds for hearing ex-parte, the Court is not absolved of its duty of deciding the case in accordance with law; rather an additional obligation is cast on the Court to act with caution and be watchful to see that in the absence of any opponent, the plaintiff does not succeed in achieving what he is not entitled to or which he does not deserve, and that in no case he succeeds in over-reaching the Court.....

33.But there is substance in the other limb of this submission made by the learned senior counsel for the defendant-appellant. Even if the suit proceeds ex-parte and in the absence of a written statement, unless the applicability of Order VIII Rule 10 of the CPC is attracted and the Court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex-parte the Court is not bound to frame issues under Order XIV and deliver the judgment on every issue as required by Order XX Rule 5. Yet the Trial Court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the 'point for determination' and proceed to construct the ex-parte judgment dealing with the points at issue one by one.....”

10. Mr. Mehta submitted that by moving an application under Section 73 of IE Act, respondent/defendant was only assisting the Court to arrive at a correct and reasonable finding. In this context, he referred to following observations of Hon’ble Supreme Court in Modula India’s case (supra) wherein it has been held as under:-

“18.....Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is nothing in law to preclude him from demonstrating to the court that the plaintiff’s witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfill the terms of the statute.

19. To us it appears that the basic principle that where a plaintiff comes to the court he must prove his case should not be whittled down even in a case where no defendant appears. It will at once be clear that to say that the Court can only do this by looking the plaintiff’s evidence and pleadings supplemented by such questions as the court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the plaintiffs statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff’s averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiffs case.”

11. Mr. Mehta further submitted that reference to rent receipts to forensic laboratory has been done by trial court in exercise of its discretion under Section 73 of IE Act to elicit the truth. He stated that veracity of rent receipts is necessary to avoid fraud being played upon the Court.

12. On a careful perusal of the present case, I am of the view that examination of rent receipts is not just to demonstrate falsity and weakness of plaintiff’s case, but it is to claim continuation of tenancy beyond the date of notice terminating the tenancy. Consequently, receipts are relevant not just to determine quantum of damages or relief that petitioner/plaintiff is entitled to, but are also an attempt on the part of respondent/defendant to substantiate his own defence and/or to adduce his

own evidence. I agree with Mr. Oberoi that intent in filing Section 73 application was also to prove respondent/defendant's defence as well as to prove those documents which he had lost the right to file and prove. Needless to say, what a party is prohibited in law from doing directly, it cannot achieve the same by an indirect method.

13. Further, admittedly, the order striking off respondent/ defendant's defence has attained finality. After striking of respondent's defence, respondent/defendant has certain limited rights available to him. The Hon'ble Supreme Court in case of Modula India (supra) has exhaustively dealt with nature of rights that are available to a defendant whose defence has been struck off. The relevant observation in the said judgment are reproduced hereinbelow for ready reference :-

24. For the above reasons, we agree with the view of Ramendra Mohan Dutta, ACJ that, even in a case where the defence against delivery of possession of a tenant is struck off under Section 17(4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

- (a) to cross-examine the plaintiff's witnesses; and
- (b) to address argument on the basis of the plaintiff's case.

We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.”

(emphasis supplied)

14. Even this Court while allowing respondent/defendant's CM(M) 3167/2005 had observed that defendant has only a right to confront a witness with documents not on record and if the witness were to deny those documents, then the said documents would not be exhibited. The judgments of Hon'ble Supreme Court of India in Balraj Taneja and Ramesh Chand, referred to hereinabove, are cases arising under Order 8 Rule 10 and do not deal with applicability of Section 73 of the Evidence Act to a case where respondent/defendant's defence has been struck off. Consequently, the said two judgments are irrelevant to the facts of the present case.

15. I am further of the view that trial court has misconstrued and misrepresented the purpose, scope and effect of Section 73 of IE Act. Section 73 of IE Act is reproduced hereinbelow for ready reference :-

“73. Comparison of signature, writing or seal with others admitted or proved - In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also with any necessary modifications, to finger-impressions.

(emphasis supplied)

16. I am of the opinion that on a harmonious reading of Order XIII Rule (7)(2) of CPC and Section 73 of IE Act, it is not open to compare signatures on documents which do not form a part of the record. I am in agreement with Mr. Oberoi's submission that as said rent receipts had been denied by petitioner/plaintiff and as the said documents do not form a part of the record, these documents cannot be proved by evidence. Consequently, in my view even though respondent/defendant had a right to confront the plaintiff's witness with disputed rent receipts, he did not have the right to seek their reference to CFSL under Section 73 of IE Act. Moreover, the reasoning given by trial court in the impugned order while allowing respondent's application, as referred to in paragraph 6 hereinabove, is completely contrary to the mandate of Section 73 inasmuch as the trial court could not have allowed respondent/defendant's application with a view to give respondent/defendant a full opportunity to present his case and to ensure that his 'handicap' was not exploited by petitioner.

17. In view of aforesaid observations, present petition is allowed and impugned order dated 7th March, 2008 is set aside but with no order as to costs. Consequently, present petition and pending applications are disposed of.

Sd./-

MANMOHAN,J

MARCH 17th, 2009