

**THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA
RAO**

CIVIL REVISION PETITION No.2334 of 2009

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ORDER:
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This Civil Revision Petition is filed challenging the order

dt.09-04-2009 in I.A.No.110 of 2009 in O.S.No.11 of 2000 of the Junior Civil Judge at Vikarabad, Ranga Reddy District.

2. The petitioner herein is 2nd defendant in the suit.

3. The 1st respondent/plaintiff herein file the suit for declaration that he has got preferential right to purchase the plaint schedule property and contending that defendants are liable to sell it to 1st respondent. He also sought a consequential decree for a mandatory injunction directing the petitioner as well as 2nd respondent to allot the plaint schedule property to him after taking its cost as fixed by the Court or fixed by the 2nd respondent or the amount of auction conducted earlier.

4. In the plaint, it is the contention of 1st respondent that the plaint schedule property is a plot which was put to

sale in the year 1985 by 2nd respondent and that 1st respondent had participated in the bidding and it was knocked down in his favour for Rs.45,600/-, of which he paid 1/4th on 26-10-1985. According to 1st respondent, a sale certificate was also issued on 17-11-1988 after payment of balance consideration and thus he became the absolute owner and possessor of the plaint schedule property. According to the 1st respondent, subsequently on 16-03-1990, the 2nd respondent returned the amount paid by 1st respondent stating that the subject property was not suitable in size for construction. He contended that at the request of 1st respondent, the 2nd respondent passed a resolution on 30-11-1996 stating that preference should be given to 1st respondent for purchase of the plaint schedule property since he participated in the open auction and suffered loss as his money was withheld for a period of 4 years by 2nd respondent. In the said resolution, according to

1st respondent, it was also stated that a case had been filed by petitioner which was pending. According to 1st respondent, subsequently a resolution was passed on 01-01-2000 to allot the plaint schedule property to petitioner and therefore he filed the suit.

5. Written statement was filed by 2nd respondent/1st defendant opposing the suit claim. In the written statement, 2nd respondent contended that although 1st respondent was the highest bidder in the auction held in 1985 for the subject property and paid the money, subsequently the money was returned and 1st respondent had received it without any condition to give preference in the future auction or allotment. It was also contended that the later resolution to allot the plaint schedule property to petitioner was in accordance with the provisions of the Act, that there was no collusion between the petitioner and 2nd respondent and when the said plot was already allotted to petitioner, there was no question of again allotting it to 1st respondent.

6. The petitioner also filed a written statement opposing the suit claim. He took the same stand as was taken by 2nd respondent.

7. Issues were framed and subsequently trial commenced. The 1st respondent examined his witnesses and matter was then posted for examination of witnesses of 2nd respondent/1st defendant.

8. According to 1st respondent, as 2nd respondent did not come forward to give evidence, the case was closed as regards the 2nd respondent's evidence and it was posted for the evidence of petitioner. Thereafter at the instance of petitioner, the 2nd respondent filed a petition to reopen the case for his evidence. The said petition was allowed and affidavit in lieu of chief-examination of the witness on behalf of 2nd respondent was filed, but the said witness did not turn up even to swear the affidavit. After giving several adjournments, the Court below eschewed that affidavit. Thereafter after several adjournments for the petitioner's evidence, the 2nd respondent again filed a petition to adduce evidence and filed a fresh affidavit in lieu of chief-examination with the permission of the Court.

9. According to 1st respondent, on 24-02-2009, the Court then insisted for cross-examination of that witness produced by the 2nd respondent herein by 1st respondent first. The learned counsel for 1st respondent then informed the Court that since the petitioner is sailing with 2nd respondent, since petitioner is claiming property through 2nd respondent and 2nd respondent is admitting the claim of petitioner, the petitioner should cross-examine that witness first, and after him only the 1st respondent

would cross-examine him. It was further contended that 1st respondent was the contesting party and the claim of 1st respondent was disputed by both petitioner and 2nd respondent. The matter was adjourned to 26-02-2009 as the counsel for petitioner was not present on 24-02-2009.

10. On that day, the 1st respondent's counsel was present before the Court till 2 p.m. and then he received a message that his co-brother was serious and admitted in SVS Hospital, Mahaboobnagar. So he left the Court.

11. However, according to 1st respondent, the matter was called after lunch. Since the witness was not present before lunch, at the time when the counsel for 1st respondent was called and the petitioner's counsel reported ready before the Court stating some of the facts which were recorded on the docket and also pleaded that the burden lies on 1st respondent to cross-examine D.W.1, after recording the said contention of the petitioner, the Court called 1st respondent's counsel, recorded his absence, and passed a docket order directing the 1st respondent to cross-examine D.W.1 first.

12. On 12-03-2009, 1st respondent filed I.A.No.110 of 2009 under Order IX Rule 7 CPC to set aside the exparte

order passed on 26-02-2009 directing 1st respondent to cross-examine D.W.1 and sought a direction to petitioner to cross-examine D.W.1 first. In the affidavit accompanying the said application, he set out the above facts. It was specifically contended in the affidavit that if the party who is sailing with the party giving evidence is cross-examined at the end, cross-examination of the contesting party will be neutralized and therefore the petitioner has to cross-examine D.W.1 first and not 1st respondent.

13. Counter affidavit was filed to that application by petitioner insisting that 1st respondent alone should first cross-examine D.W.1. It was further contended that on 26-02-2009 the 1st respondent was very much present in the Court hall, that he did not raise any objection and therefore, the order passed by the Court cannot be said to be an ex parte order. He disputed the contention raised by 1st respondent regarding the order of cross-examination of witnesses.

14. By order dt.09-04-2009, the Court below allowed I.A.No.110 of 2009 over ruling the objections of the petitioner. After advertng to the contentions of the parties, it accepted that the docket order

dt.26-02-2009 was passed in the absence of the 1st respondent's counsel and even though the 1st respondent was present in the Court at time, still his counsel should have been heard before passing the said order. It held that written statement of the petitioner as well as 2nd respondent reveals that they are sailing together and therefore the petitioner has to cross-examine D.W.1 in the first instance. It held that even if Order IX Rule 7 CPC is not applicable, Section 151 CPC would be applicable.

15. Challenging the same, this Revision is filed.

16. The learned counsel for petitioner contended that the order passed by the Court below is unsustainable; in the same application two reliefs cannot be sought for as per the Civil Rules of Practice; that the Court below was not correct in insisting that petitioner should cross-examine D.W.1 first instead of 1st respondent; and therefore, the order passed by the Court below required to be set aside.

17. The learned counsel for 1st respondent on the other hand contended that there is no bar for filing a single application seeking two reliefs particularly when the relief seeking a direction to petitioner to cross-examine D.W.1 first is consequential to setting aside the exparte order dt.26-02-2009 directing 1st respondent to cross-examine

D.W.1 first; that the order dt.26-02-2009 has been passed in the absence of his counsel in the trial Court; even if he, the 1st respondent, was present in the Court, it can still be taken to be an ex parte order and the provisions of Order IX Rule 7 CPC are attracted. He relied upon the judgment in **Des Raj Chopra and Others Vs. Pooran Mal and others**^[1].

18. I have noted the submissions of both sides.

19. There is no dispute that the petitioner as well as 2nd respondent are opposing the suit claim and from the facts narrated above, it is clear that they are sailing together. It is also not in dispute that the docket order dt.26-02-2009 was passed in the absence of the counsel for 1st respondent/plaintiff. Although the 1st respondent himself was present in the Court at the time this happened, since it was a matter of law and since his counsel was absent on the ground that his co-brother was admitted in hospital in a serious condition, the Court below ought not to have passed the said order on 26.2.2009 without hearing the counsel for 1st respondent and it ought to have adjourned the matter to a later date to consider the said question. It may not be expected of a party to be in the know of these intricacies of law and raise objections on legal issues

particularly when he had engaged a counsel to represent him. Therefore, in my considered opinion serious prejudice has been caused to 1st respondent by the order dt.26-02-2009 passed by the Court below. The 1st respondent was therefore entitled to file I.A.No.110 of 2009 invoking both Order IX Rule 7 CPC as well as Section 151 CPC to set aside the said order (which had directed

him to cross-examine D.W.1 first) and consequently directing the petitioner to cross-examine D.W.1 first. Since the latter relief is consequential to the earlier relief, in my opinion, there is no bar for the 1st respondent seeking both reliefs in the said I.A. notwithstanding the provisions contained in the Civil Rules of Practice.

20. Coming to the legal question whether a defendant has right to cross-examine the co-defendant, the said issue is no longer *res integra*.

21. In **Des Raj Chopra and Others** (1 supra), an eviction petition was filed by 1st respondent therein alleging that the subject premises was originally let out to 2nd respondent and that the 2nd respondent had in turn sub-let it to petitioner therein collusively, who in turn had again sub-let it to 3rd

respondent therein. In the written statement, the plea of sub-tenancy was denied and it was contended that 2nd respondent tenant was a firm of which the petitioner was a partner. It was further contended that 3rd respondent has been accepted as a direct tenant and the landlord had also received rent from the said tenant. 3rd respondent filed a separate written statement taking the plea that it is a direct tenant under the landlord and had independent title as tenant and the 2nd respondent had nothing to do with the tenancy. Issues were framed and trial commenced. The witnesses examined by the petitioner's successor in interest were cross-examined by 3rd respondent without any objection having been raised by 1st petitioner/landlord. Thereafter 3rd respondent produced its witnesses and the last witness produced was R.W.7. Prior to examination of the said witness in the Court, the petitioner had given notice for production of the accounts books of 3rd respondent. It appeared that the petitioners wished to show, from cross-examination of the witnesses with reference to the books, that the 3rd respondent was accepted as a direct tenant by the landlord, and various entries in the books are supposed to support the case of petitioners. But when R.W.7, the witness for 3rd respondent was sought to be cross-

examined by the counsel for petitioner, it was opposed by the counsel for the landlord. The Additional Rent Controller accepted the plea of the landlord and disallowed the petitioner from cross-examining the witness produced by 3rd respondent. This was questioned in Revision under Article 227 of the Constitution of India before the High Court of Delhi. The main ground on which the Additional Rent Controller had refused to grant permission to petitioners to cross-examine the witness was that his defence as well as that of 3rd respondent is identical and the said rights cannot be exercised by petitioners as their rights cannot be said to be in any way adverse to that of 3rd respondent. The Delhi High Court allowed the Revision and set aside the order of the Additional Rent Controller. It held quoting the Phipson on Evidence (11th Edition, page 647) that the defendant may cross-examine a co-defendant or any other witness who has given evidence against him and reply on such evidence, though there is no issue joined between them. It also quoted from Halsbury's Laws of England(3rd Edition, Vol.XV para 809) that any party is entitled to cross-examine any other party in his evidence, or his witnesses; and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of

testing its truthfulness by cross-examination. It also quoted from Woodroffee & Ameer Ali's 11th Edition (page 2940 Note 38) that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to cross-examine. It therefore held that denial of the right to cross-examination to petitioner to cross-examine R.W.7, the witness for 3rd respondent is not correct because such refusal is making the evidence of R.W.7 inadmissible; and if the evidence of R.W.7 was treated to be as admissible, it can only be done if an opportunity has been given to all the parties including the petitioner to cross-examine him. It observed that cross-examination forms an important element of rules of natural justice and rules of natural justice require that a party should have the opportunity to adduce all relevant evidence on which he relies; that the evidence of opponent should be taken in his presence; and that he should be given the opportunity to cross-examine the witnesses examined by that party. It held that the order of the Additional Rent Controller is not a discretionary order but is an order which strikes at the root of a fair trial, under our system of jurisprudence; and that to allow any evidence to be treated admissible without giving a right to cross-examine, not only perpetuates injustice but is shocking to a judicial conscience apart

from being manifestly illegal and perverse. It held that it is not only within the power of the Court to correct such illegality, but it is incumbent on it to do, so as to prevent further mischief and stop the trial from becoming a mockery.

22. From the facts of the present case, it is clear that 1st respondent/plaintiff's case is being opposed by both petitioner/2nd defendant and 2nd respondent/1st defendant. Thus, the interest of the 1st respondent is clearly adverse to both the petitioner and 2nd respondent. Therefore, undoubtedly the 1st respondent has a right to cross-examine the witness produced by both the petitioner as well as 2nd respondent.

23. Since admittedly the 2nd respondent and the petitioner are sailing together, it would result in grave injustice if the 1st respondent/plaintiff is made to cross-examine D.W.1, a witness for 2nd respondent, before the said witness is cross-examined by the petitioner/2nd defendant. It would render the cross-examination if any done by the 1st respondent nugatory. Therefore, the contention of the petitioner/2nd defendant that he should be allowed to

cross-examine only after the plaintiff/1st respondent cross-examines D.W.1, who is the witness for 2nd respondent/1st defendant in the suit, cannot be sustained.

24. Therefore, I do not find any error in the order passed by the Court below in recalling the docket order dt.26-02-2009 and directing the petitioner to cross-examine D.W.1 first and then directing the 1st respondent to cross-examine D.W.1 next.

25. So, I do not find any merit in the Revision and it is accordingly dismissed. No costs.

26. As a sequel, miscellaneous petitions pending if any, shall stand disposed of.

JUSTICE M.S. RAMACHANDRA RAO

Date: 25-06-2015

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[\[1\]](#) AIR 1975 Delhi 109