

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.4640 OF 2015

ORDER:

This Civil Revision Petition is filed challenging the order dated 03.09.2015 in I.A.No.1405 of 2015 in O.S.No.48 of 2010 passed by the Senior Civil Judge, Proddatur.

The petitioner is the plaintiff in O.S.No.48 of 2010 on the file of Senior Civil Judge, Proddatur, which is filed for the relief of declaration of title and also for consequential injunction. The claim is based on the oral gift of the year 1989 by one Mudava Fakruddin in favour of the plaintiff subsequent to marriage of plaintiff with his daughter as illitom son-in-law. It is the claim that pursuant to the gift, plaintiff is in possession and enjoyment of the property and there is also O.S.No.180 of 2009 for the plaint schedule property covered there under and pattadar passbook also issued in favour of the plaintiff consequential to the said oral gift as owner.

The defendants are contesting even disputing the said oral gift in the written statement filed. The trial was in progress and after closure of evidence of plaintiff two more witnesses examined as PWs.2 and 3 and also in relation to said oral gift to be proved and defendants evidence also completed as can be seen from the record. It is at the stage of arguments, the defendants filed I.A.No.1405 of 2015, for recall of PWs 1 to 3 saying that in the course of preparing for arguments, it is noticed that there is no cross examination, inadvertently in relation to oral gift though disputed in the written statement in support of pleading. The contest of the plaintiff as respondent to the said application for recall of PWs.1 to 3 by reopening the matter is that, it is not a matter of course of mere asking to allow and allowing such application will cause serious prejudice to the rights of the plaintiff and it changes the nature of evidence already on record and the defendants having ample opportunity to cross examine and also cross examined PWs.1 to 3 thereby no grounds to reopen much less to recall PWs.1 to 3.

It is pursuant to the rival pleadings and contest the lower Court by order dated 03.09.2015 allowed the application with the observation, which reads as

follows:

"The case record shows that the petitioners/defendants filed O.S.No.61/2011 on the file of this Court for the relief of partition the respondents/plaintiffs herein filed O.S.No.48/2010 for the relief of declaration and for consequential permanent injunction regarding the same subject matter, hence O.S.No.61/2011 was clubbed with O.S.No.48/2010 for common trial and judgment, after completion of the evidence on both sides, the case is coming for arguments, now the petitioners/defendants came with the present applications.

Order 18 R.17 CPC speaks that the Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

As can be seen from the cross examination of PW.1 there was no cross examination in respect of the oral gift pleaded by the respondent/plaintiff. Even Appellate Courts are receiving add evidence under Order 41 R.27 C.P.C., in such event this being a trial Court if an opportunity is given to the petitioners/defendants no prejudice will be caused to the opposite party, when the PW1 to 3 are recalling for limited purpose as indicated to the extent as mentioned in the petition. No doubt there is a delay on the part of the petitioners/defendants to file this applications, merely because of that this being a trial Court the valuable right of the parties contradict a fact can be denied, such delay can be compensate to the respondent/plaintiff by way of costs. Hence considering above facts and circumstances, in order to meet the ends of justice, this Court is inclined to allow the above said two applications on payment of costs of Rs.1,000/- payable to the respondent/plaintiff."

It is impugning the allowing the said application by order dated 03.09.2015 the plaintiff having been aggrieved filed the present civil revision petition under Article 227 of the Constitution of India.

Heard the learned counsel for the petitioner/plaintiff before admission and before notice to defendants and perused the material on record.

In support of the revision petition, the learned counsel for the petitioner/plaintiff in impugning the order for recall of PWs.1 to 3 placed reliance in **M/s.Bagai Construction through its proprietor Mr.Lalit Bagai V. M/s.Gupta Building Material Store (Civil Appeal No.1787 of 2013 of the Apex Court decided on 22.02.2013**, where referring to **Vadiraj Nagappa Vernekar (Dead) through L.Rs. v. Sharadchandra Prabhakar Gogate** and subsequent expression in **K.K.Velusamy v. N.Palanisamy** and the other decision of this Court in **A.R.K.Raju v. A.V.S.Raju (C.R.P.Nos.5065 and 5067 of 2013, decided on 17.07.2014)**. In **A.R.K.Raju** (supra), learned Judge of this

Court placed reliance on **Vadiraj Nagappa Vernekar** (supra). Even in **Vadiraj Nagappa Vernekar** (supra) what is observed by the Apex Court was the power under Order XVIII Rule 17 C.P.C. to be exercised only in appropriate cases sparingly and not as a general rule merely on the ground that recall and re-examination of the witness would not cause any prejudice to the parties. The learned Single Judge of this Court in **A.R.K.Raju** (Supra) referred the said conclusion of the Apex Court in disposal of the petition on own facts. In **Bagai Construction (Supra)** while referring to the scope of Order VII Rule 14 C.P.C. and under Order XVIII Rule 17 and Section 151 C.P.C. and **Vadiraj Nagappa Vernekar** (supra) extracting paras 25, 28, 29 and 31 therein and another expression of **K.K.Velusamy** (supra), subsequent one, observed that apart from Order XVIII Rule 17 by referring to Section 151, the Apex Court concluded that in the interest of justice and to prevent abuse of process of the Court, the trial Court is free to consider whether it was necessary to reopen the evidence and if so, in what manner and to what extent and it should be permitted in exercise of its power under Section 151 of C.P.C. and extracted para 19. It is there from concluded in **M/s.Bagai Construction (Supra)** that order of the trial Court dismissing the application restored by setting aside the order of the High Court on facts for no grounds to recall.

Here, coming to the case on hand, the plaintiff's claim is based on the so called oral gift of the year, 1989. It is thus for the plaintiff to establish the oral gift. The defendants are entitled to cross examine the plaintiff and the witnesses of the plaintiff in support of evidence of plaintiff of oral gift, in discharge of their burden or to disprove the case of the plaintiff, as the case may be from the burden of proof or onus probandi. The application clearly speaks that it was due to inadvertence, the learned counsel of defendants in relation to the so-called oral gift, not done cross examination touching the same. The order of the learned Senior Judge clearly speaks a perusal of the cross examination of PW.1 also nowhere contain touching the dispute relating to the oral gift any suggestion even. Thus, interest of justice requires to permit. This is also for the reason that as held by this Court in **Cheedella Padmavathi(Died) per L.Rs v. Cheedella Lakshminarasimharao (died) per L.Rs**, that rules of justice require a party cross examining, to put the crucial and important part of his defence to the witness of the other side in the cross

examination and if no question is put to the witness in the cross examination with regard to certain facts challenging the same then such fact has to be presumed to be true. It all depends on the nature of the *lis* from preponderance of probabilities in the civil matter. Once such is the proposition definitely it causes prejudice to the defence of the defendants, if they are not allowed to further cross examine the PWs.1 to 3, in relation to the oral gift propounded by the plaintiff and practically no prejudice is caused to the plaintiff there from as it is for the plaintiff to establish the so called oral gift.

Further the Apex Court in **Salem Advocate Bar Association, Tamilnadu(Case-II) v. Union of India** at para-13 observed that as per Section 151 C.P.C. and Order XVIII Rules 17, 17A equally in appellate Court under Order 41 Rule 27 in relation to a production of a witness at later stage by reopen and its permissibility, the Court had in built power to parties to produce evidence not known to them earlier or which could not be produced despite due diligence and Court always got inherent power to sub-serve the ends of justice provided there are no latches and there is due diligence, it is even to permit new evidence despite Order XVIII Rule 17A deleted from the statute book from the amendment. The substance of the expression therein is power is always vested in the Court to sub-serve the ends of justice that is what is also laid down in **M/s.Bagai Construction (Supra)**. Once such is the case, as observed in the factual matrix, there is nothing for this Court while sitting in revision invoking Article 227 of the Constitution of India against the impugned order permitting for recall of Pws.1 to 3 to sub-serve the ends of justice by imposing costs of Rs.1,000/-.

Accordingly, before admission, this Civil Revision Petition is dismissed. There is no order as to costs.

Miscellaneous petitions pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:03-11-2015

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