

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

CIVIL REVISION PETITION Nos.1135, 1316 AND 1521 OF 2015

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CIVIL REVISION PETITION No.1135 OF 2015

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Between:

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Vempati Venkateswar Rao ... Petitioner

And

Challa Vijaya and another ... Respondents

JUDGMENT PRONOUNCED ON : 21.09.2015

HON'BLE SRI JUSTICE : CHALLA KODANDA RAM

1. Whether Reporters of : Yes/No
Local newspapers
may be allowed to see
the Judgment ?
2. Whether the copies of : Yes/No
judgment may be
marked to Law Reporters/
Journals ?
3. Whether Their Ladyship/ : Yes/No
Lordship wish to see the
fair copy of the judgment ?

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

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Between:

Vempati Venkateswar Rao

... Petitioner

And

Challa Vijaya and another

... Respondents

For petitioners : Sri V. Raghu, Advocate

For Respondents : Sri K. Lakshmaiah,
for Sri V. Brahmaiah Chowdary

< Gist:

> Head Note:

? CITATIONS:

1. 2013 (4) ALT 192
2. 2014 (5) ALT 186
3. 2014 (3) L.S. 177
4. 2002 (3) ALT 510
6. AIR 1997 SC 409

C/15

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

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COMMON ORDER:

The common order dated 02.02.2015 passed in I.A.Nos.252, 253 and 254 of 2014 in O.S.No.410 of 2014 is under challenge.

The said I.As., were filed by the petitioner seeking to reopen, recall PW.1 and receive and admit the certified copies of deposition of PW.1 and the judgment in C.C.No.387 of 2008 on the file of the Judicial Magistrate of First Class, Kodada. By common order dated, 02.02.2014, the said I.As., were dismissed.

The petitioner is the plaintiff and the suit is filed seeking specific performance of agreement of sale, dated 25.01.2003. The petitioner was examined and cross examined as PW.1 on 03.06.2011 and a memo was filed on 17.06.2011 reserving his right to adduce rebuttal evidence. On behalf of the defendants, defendant No.2 was examined as DW.4, who deposed before the Court that he filed a complaint in Crime No.70 of 2007 at

Police Station Kodada Town and the same was registered as C.C.No.387 of 2008 on the file of the Judicial Magistrate of First Class, Kodada. The said C.C. pertains to the plaint schedule property. Copies of the complaint and charge sheet were marked as exhibits on behalf of DW.4. DW.4 gave his evidence in the said C.C. on 27.02.2013, 28.03.2013 and 28.06.2013, on which date the evidence on his behalf was closed. C.C.No.387 of 2008 was ended in acquittal on 05.11.2013. DW.4 was cross examined in O.S.128 of 2006 on 03.08.2012 and 14.09.2012. The examination and cross examination of DW.4 was completed by 14.09.2012, by which date his evidence

was not recorded in C.C.No.387 of 2008, therefore, the plaintiff/petitioner could not bring on record the deposition of DW.4 and the order of acquittal dated 05.11.2013. In the process of giving evidence, DW.4 made certain admissions in C.C.No.387 of 2008 and the factum of dismissal of the C.C. itself is relevant for the purpose of adjudication of the suit. With those averments, the petitioner filed I.As., as referred to above.

Defendant No.1 did not file any counter.

Defendant No.2 filed counter raising objection with regard to the very maintainability of the I.As., on the ground of delay and that the same cannot be brought on record on account of Section 33 of the Indian Evidence Act, 1872 (for short, 'the Act').

Learned Senior Civil Judge, Huzurnagar, after considering the facts on record, respective arguments and also by relying on the judgments of this Court reported in **Talasila Suresh v. Naarla Srinivasa Chakravathi**^[1], **Katru John Kennedy v. Subbavarapu Lakshmi**^[2] and **Guduru Nirmala v. Guduru Ashok Kumar**^[3], dismissed the I.As., on 02.02.2015. He also recorded that the suit is at the arguments stage and the defendants arguments were also heard in part and even on the ground of delay, the I.As., were liable to be dismissed.

Sri V. Raghu, learned counsel for the petitioner, submits that between May, 2013 and May, 2014, there was no Judicial Officer posted at Suryapet, where the original suit was stated to be filed. In May, 2014, the Sub Court was established at Huzurnagar and the same was also not functional for six months due to transfer of files and renumbering of the cases at Huzurnagar. The said suit was stated to be transferred from Suryapet to the

Sub Court at Huzurnagar and the 1st date of hearing was 19.11.2014

and immediately on 03.12.2014, the I.As., were filed. Hence, he submits that the ground of delay on which the I.As., came to be dismissed is unsustainable in the facts of the present cases. He further submits that Section 33 of the Act has no application to these revisions and further by placing reliance on the judgment of this Court in **Jerrypothu Shamul John Babu v. Peddipoga Anandarao**^[4] and the judgment of the Supreme Court in **Union of India v. Moksh Builders and Financiers Ltd.**^[5], submits that the order passed by the learned Senior Civil Judge, Huzurnagar, is liable to be set aside and the I.As., are to be allowed.

On the other hand, Sri K. Lakshmaiah, learned counsel representing Sri V. Brahmaiah Chowdary, learned counsel for the respondents, by bringing to the notice of this Court Section 33 of the Act and by placing reliance on the judgments of this Court referred to in the order passed by the learned Senior Civil Judge, submits that the law declared by this Court in the above judgments is unexceptional and the judgments of the Supreme Court as well as this Court are not applicable in the present set of facts and, hence, prayed for dismissal of these Civil Revision Petitions.

The facts are not in dispute. The delay, which is attributed to the petitioners in filing the I.As., may not be justified, particularly in considering the fact that for a long period there was no Judicial Officer functioning and there was also confusion with regard to the transfer of the cases from Suryapet Court to Huzurnagar. So far as the said aspect is concerned, in all fairness, the order of the learned Senior Civil Judge, Huzurnagar, cannot be said to be sustainable. However, the relevancy of Section 33 of the Act is required to be considered and the same reads as under:

“33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. – Evidence given by a witness in a judicial

proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

That the proceeding was between the same parties or their representatives in interest;

That the adverse party in the first proceeding had the right and opportunity to cross-examine;

That the questions in issue were substantially the same in the first as in the second proceeding.”

In the present revisions, none of the conditions, which have been enumerated under Section 33 of the Act, are either pleaded or proved. In other words, the conditions, which entitle invocation of Section 33 of the Act to bring on record the evidence given in other proceedings, are not present. This Court in **Talasila Suresh** (1 supra) and **Katru John Kennedy** (2 supra) held that existence of the circumstances mentioned under Section 33 of the Act is mandatory. It is also held in **Guduru Nirmala** (3 supra) that the aspect of delay and importance of adhering to the procedure prescribed has been emphasized.

In the present set of facts and on account of confusion that the mandatory conditions prescribed under Section 33 of the Act being absent, the depositions in C.C.No.387 of 2008 cannot be brought on record. The two judgments, referred to by learned counsel for the petitioner, are not relevant and they do not answer the objection raised in the present cases on behalf of the respondents.

The Supreme Court in **Moksh Builders and Financiers Ltd** (5 supra) held that admissibility or otherwise of the depositions made by one of the witnesses in the suit and in particular admissions of co-defendant cannot be admitted in another case. That was not a case where there was an attempt on the part of the parties to bring on record the depositions or evidence or any other suit or a case or proceeding. In the said judgment, the Supreme Court held as under:

“Another argument which has been advanced against the admissibility of the aforesaid admissions of defendant No.3 is that they could be evidence only in terms of Section 33 of the Evidence Act. That argument is also quite untenable because Section 33 deals with statements of persons who cannot be called as witnesses, and does not restrict or override the provisions relating to admissions in the Evidence Act. The High Court also committed a similar error of law in its impugned judgment. The aforesaid admissions of defendant No.3 are therefore satisfactory evidence to prove that he himself was the owner of the house and his son defendant No.2 was merely a “benamidar” for him.”

This judgment of the Supreme Court was the basis for the judgment in **Jerrypothu Shamul John Babu** (4 supra). In that case, no objection was raised with respect to the conditions which are required to be satisfied before the depositions in another proceeding could be relied on and as such there was no occasion for the Court to consider the relevancy or otherwise of the depositions in other suit. In that view of the matter, the said judgment is clearly distinguishable and not applicable for the present set of facts. Therefore, there is no error or illegality in the order passed by the learned Senior Civil Judge, Huzurnagar.

In the result, the Civil Revision Petitions are liable to be dismissed and the same are accordingly dismissed. No order as to costs.

The Miscellaneous Petitions filed in these Civil Revision

Petitions shall also stand disposed of.

CHALLA KODANDA RAM, J

21.09.2015

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[\[1\]](#) 2013 (4) ALT 192
[\[2\]](#) 2014 (5) ALT 186
[\[3\]](#) 2014 (3) L.S. 177
[\[4\]](#) 2002 (3) ALT 510
[\[5\]](#) AIR 1977 Supreme Court 409