

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

C.R.P.No.2863 of 2014

ORDER:

Heard Sri Bankatlal Mandhani, learned counsel for the petitioner and Sri S.R.Mahajir, learned counsel for respondent Nos.1 to 5. Respondent Nos.6 to 28 are said to be not necessary parties in the Revision Petition.

2. This Revision Petition is filed challenging the order dt.31-07-2014 in I.A.No.458 of 2014 (old I.A.No.1348 of 2013) in O.S.No.71 of 2004 of XXVII Additional Chief Judge, Secunderabad.

3. The petitioners are defendant Nos.15 and 16 in the above suit filed by respondent Nos.1 to 5 for partition and separate possession of *matruka* property of late Shaikh Adam.

4. Written Statement was filed opposing the suit claim and trial commenced. Affidavit in lieu of chief examination of P.W.1 was filed on 06-11-2009. It appears that cross examination, on the basis of the said affidavit, was also done by the petitioners and other defendants in the suit. During the course of the said cross examination, it was brought to the notice of P.W.1/1st respondent that the said affidavit in lieu of chief examination filed by him was not signed by him in the last page and that it was also not attested.

5. Therefore, 1st respondent filed I.A.No.458 of 2014 to receive and substitute a notarized affidavit of chief examination of P.W.1 in the place of chief examination affidavit dt.06-11-2009 contending that his failure to sign on the last page and getting the affidavit attested is only on account of inadvertence and was neither willful nor done on purpose, but occurred on account of advanced age and ill health. The 1st respondent therefore contended that by way of abundant caution, he is filing copy of the chief examination affidavit duly notarized and no prejudice would be caused to the petitioners and other defendants, if the notarized chief examination affidavit annexed thereto is received in substitution of the chief examination affidavit dt.06-11-2009. It was also specifically stated that the contents of the chief examination affidavit dt.06-11-2009 (i.e. notarized affidavit) are identical with the earlier affidavit and the notarized chief examination affidavit filed along with the I.A. would rectify the inadvertent lapse of failing to sign on the last page and in not getting it attested by him.

6. This application was opposed by 2nd respondent contending that notarized chief affidavit had not been served on him and his counsel and the same is not in compliance with Order 19 CPC. He also contended that substitution of the chief examination affidavit dt.06-11-

2009 by the new notarized affidavit is not warranted unless the earlier chief examination affidavit is eschewed from the record. He also stated that the cross examination has to be recorded afresh.

7. By order dt.31-07-2014, the Court below allowed the said I.A. and substituted the evidence affidavit of P.W.1

dt.06-11-2009 with the notarized chief examination affidavit of P.W.1 dt.17-09-2012. It held that as far as the validity of the affidavit is concerned, that stage has not reached and it would be considered at the time of appreciating evidence. It observed that in a way P.W.1 had substantiated his unsigned and unattested evidence affidavit in open court by undergoing cross examination and in order to avoid technical complications, he had sought substitution of such unsigned affidavit with a notarized one. It held that substitution by the notarized affidavit in place of the earlier chief examination affidavit would not in any manner offend or prejudice the respondent

Nos.1 to 5. Observing that the procedural law is meant for rendering substantial justice and not for denial of the same or to frustrate the litigation, it observed that the defect is a curable one and does not go to the root of the case; and this is done without prejudice to the rights of the petitioners to agitate against any grievance at the relevant time of appreciating the evidence since both the

substituted and substitute evidence is available with the record.

8. Challenging the same, this Revision Petition is filed.

9. Learned counsel for the petitioners contended that the notarized affidavit is not properly verified and in view of the decision of the Supreme Court in **AKK Nambiar Vs. Union of India and another**^[1], it could not have been accepted by the Court below. It is pertinent to note that in the impugned order, no reference is made to the objections now raised by the learned counsel for the petitioners in respect of the notarized affidavit i.e. that does not conform with the Order 19 CPC.

10. No doubt in the counter affidavit filed in the Court below, it was mentioned by the second petitioner that the notarized chief affidavit is also not valid as per Order 19 CPC but the said point does not appear to have been argued before the Court below. Nowhere in the grounds of Revision Petition, the petitioner raised a contention that the point with regard to notarized chief affidavit being invalid on account of alleged non conformity with Order 19 CPC, was raised. Without arguing the said point before the Court below, it is not open to the petitioners to raise the said point for the first

time herein in this Revision Petition.

11. In any event, the Court below has already observed that the stage that deciding about the validity of the notarized affidavit has not come and it has allowed the substitution without prejudice to the rights of the petitioners to agitate any grievance they may have in respect of the notarized affidavit at the time of appreciation of the evidence.

12. The other contention of the learned counsel for the petitioners is that both the earlier chief examination affidavit dt.06-11-2009 and another chief examination affidavit along with the notarized affidavit are allowed to be kept on the record of the Court below and this is impermissible.

13. This contention is untenable for the reason that the Court below has already observed that I.A.No.458 of 2014 is allowed and the notarized affidavit of P.W.1 dt.17-09-2012 would stand substituted for the evidence affidavit of P.W.1 dt.06-11-2009.

14. Merely because the earlier chief examination affidavit dt.06-11-2009 forms part of the record of the Court below, no prejudice would be caused to the petitioners since what would be looked at is the notarized affidavit of P.W.1 dt.17-09-2012 which substituted it.

15. Therefore there is no merit in the Civil

Revision Petition and the same is accordingly dismissed.

No costs.

16. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 20-08-2015

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[\[1\]](#) AIR 1970 S.C. 652